

Nathaniel Peter Rathvon—By Defendant—Direct

(2188)

NATHANIEL PETER RATHVON, called as a witness on behalf of defendant RKO defendants, etc., being first duly sworn, testified as follows:

Direct Examination by Mr. Leisure:

Q. Your name is N. Peter Rathvon? A. Yes.

Q. Where do you live, Mr. Rathvon? A. Mamaroneck, New York.

Q. How long and in what capacities have you been associated with Radio-Keith-Orpheum Corporation? A. I first became associated with the company in 1936 when I was working on problems of reorganization on behalf of a banking group.

In July, 1939, I became a director of the company then in receivership, and also a member of its executive committee. I became chairman of the executive committee that same year.

In 1941 I became a vice-president of the company and in June, 1942, I became its president.

Q. Will you state the names and functions of the principal companies of Radio-Keith-Orpheum organization, please.

A. RKO is primarily a holding company. Its distributing and producing function is primarily in one company known as RKO-Radio Pictures. The only exception to that is the production of our newsreels and certain shorts that are handled by a company or made by a company known as Pathe (2189)

News, but they are also distributed by RKO-Radio Pictures.

There are several theatre-holding companies in the RKO group: They are B. F. Keith, RKO-Orpheum, RKO-Midwest and RKO-Proctor.

The actual physical operations are handled by three service corporations, one known as RKO Service, the other

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RKO Film Booking, and the other, a vaudeville booking company of small importance.

Q. Will you please state what if any important positions you hold in the subsidiaries you have mentioned, Mr. Rathvon? A. I am president of the subsidiary B. F. Keith, and I am chairman of the board of all the rest of the subsidiaries.

Q. When was Radio-Keith-Orpheum organized? A. 1928.

Q. And what were the circumstances that led to the organization of RKO? A. RKO was created, really, as the result of the advent of sound in motion pictures. As early as 1926 there was a great deal of experiment in sound in motion pictures, and two of the companies that were active in that field were Electrical Research Products Company, a subsidiary of Western Electric, and Radio Corporation of America, known as RCA. Those were the two leading companies.

The first sound pictures made by Fox and Warner in 1926 used techniques controlled by Electrical Research (2190)

Products, generally referred to as Erpi. So that the early studio equipment was Erpi-equipped.

By the time Radio Corporation of America was ready to enter this field a couple of years had gone by; and when they stepped out to market their Photophone process, they found that most of the studios in Hollywood had been pretty well equipped with the Erpi equipment, and they were in many of the leading theatres.

So they undertook to get into this field by acquiring production facilities that were not equipped and acquiring theatres. In other words they went into this field which was partially closed to them by going into the picture business.

Q. What steps were taken to secure production and distribution facilities? A. Well, the first step RKO acquired a producing distributing company. It was a company known as FBO Productions, Inc., organized in 1920. It was not an

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important producing company. It made minor pictures. But it did have a distributing organization of about 34 exchanges, and that gave them a foot in the door of production and distribution.

RCA then set about acquiring a position in theatres, and to do this it organized Radio Corporation of America, the existing company. It exchanged its holdings in—
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Q. Radio-Keith-Orpheum, did you mean? A. Radio-Keith-Orpheum Corporation, I am sorry, sir, the company of which I am now president. And into that company they transferred this production and distributing company that they had acquired, FBO Productions, and then they set about acquiring theatres by exchange of stock. There was Keith-Albee-Orpheum Corporation, the vaudeville exchange, and there was an offer made to the stockholders of that company to exchange stock of RKO for their KAO stock. There was a similar offer made to another circuit, Orpheum Circuit, Inc., and by acquiring these groups of vaudeville houses RKO got into the exhibition field. And these vaudeville houses had a problem of their own at that time. With the advent of the bigger palace movie houses, vaudeville had started its decline. These houses had all been built for vaudeville; most of them had two balconies; and with sound coming in the vaudeville theatre was somewhat weakened; so it was a fairly logical combination, for a new company coming into the sound field to acquire the vaudeville theatres rather than any other.

Q. How many were acquired, Mr. Rathvon? A. Well, KAO, at the time of its acquisition, owned and leased close to a hundred theatres. It also owned entirely a subsidiary called B. F. Keith, which had an interest, a majority interest in 19 theatres, I believe, and a minority interest—that
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is, below 50 per cent—in 90-odd additional theatres. The Orpheum Circuit, the other one, had varying interests in a number of theatres scattered all over the United States.

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After these acquisitions, which continued up to 1929, 1930, they took over another chain known as Proctor that had five big theatres in New York. They acquired theatres in the midwest, Cincinnati, Columbus, and Dayton.

Judge Hand: Does RKO own completely the Orpheum Circuit?

The Witness: The Orpheum Circuit has long since changed its form. At the time it acquired those original theatres Orpheum Circuit in its entirety was one of the companies taken over through exchange of stock.

Judge Hand: In the receivership?

The Witness: Yes, in the disasters of receivership that circuit was entirely broken up.

Q. What, if any, efforts did RKO made in those years to improve its production position? A. Well, it spent some seven million dollars on the production facilities it had acquired in Hollywood, and bought some additional facilities from Pathe Exchanges, Inc.; and at the cost of about five million dollars it acquired certain production assets from Pathe Exchanges, Inc., largely bought for the benefit of some star contracts.

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They also spent about eight million dollars on these vaudeville houses, rejuvenating them and equipping them with sound.

Q. Mr. Rathvon, what was the general nature of the theatres acquired by RKO in 1933? A. Well, with few exceptions they were the vaudeville theatres. They were generally large, well built theatres, well located, in large important cities; one or two to a city.

Q. Now, I believe you said in response to Judge Hand's question, or you intimated, at least, that RKO at one time was in receivership. When was that, please? A. RKO went into receivership in January 1933.

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Q. And when did it come out, do you know? A. Not until January 1940.

Q. And was RKO named as a defendant in this case while it was in receivership? A. That is correct.

Q. What effect did the receivership have on RKO's production, distribution and exhibition of pictures? A. Well, all during the receivership RKO maintained its producing and distributing facilities just about as they were then they acquired them. It was in the theatre end that they lost during this period, lost some 57 theatres.

Q. Will you tell the Court briefly the extent and nature of RKO's present theatre operations? A. Yes. RKO today operates 106 theatres. 62 of these are so-called first-run (2194)

theatres. The rest are second or subsequent run. And of the 106, 72 were former vaudeville houses acquired in the early stages of the company.

Q. Have you had prepared under your direction a list of the theatres operated by RKO? A. I have.

Mr. Leisure: I ask to have it marked for identification, please.

Mr. Wright: Is this any different from the one that has already gone in evidence? We have a list of RKO theatres in. It may be confusing.

Mr. Leisure: I will just have it marked for identification at this time and use it in connection with the witness's testimony; and if it is already in, Mr. Wright, I assure you I shall not offer it again. But I am informed it is not in evidence.

(Marked Defendant RKO's Exhibit RKO-1 for identification.)

Q. Was that list prepared under your direction, and is that a correct representation of the theatres? A. Yes, I believe it is a correct list of the 106 theatres I mentioned.

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Mr. Leisure: I offer it in evidence.

(Defendant RKO's Exhibit RKO-1 for identification received in evidence.)

Q. Mr. Rathvon, has there been or is there any agreement (2195)

ment or understanding between RKO and any other defendant as to the cities or areas in which they should respectively acquire or operate theatres? A. There is not.

Q. From your activities in the discharge of your responsibilities, are you familiar with the general policies and practices governing the production and distribution and exhibition activities of the various RKO companies? A. I am; as director of each of the companies, I am familiar with it; and as chief executive officer of the company I am charged with the responsibility of seeing that those policies are carried out.

Q. Now, very briefly, Mr. Rathvon, will you just describe to the Court in general the organization and functions of the production department of RKO? A. Why, our production department, except for our newsreel and small amount of short production, is entirely on the Pacific Coast in Hollywood. It is under the direction of Mr. Charles Koerner, who is the vice-president of RKO-Radio Pictures, and he has complete charge of the production end of our business, typical of all companies, that goes from the beginning when you first purchase the story until the completed picture is finally delivered to the distribution department.

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Q. Will you also please briefly describe to the Court the organization and functions of the distribution department? A. Well, our distribution department is organized on a worldwide scale. We have separate foreign and domestic distribution departments. The domestic distribution de-

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partment is under the supervision of Mr. Robert Mochrie. He has 34 offices under him, and he also has the offices in Canada. Each of those are in charge of a manager, with salesmen working under them. That department has the activity of exploiting and selling the pictures, handle the physical distribution of those to the theatres in which they are exhibited, and also is charged with the duty of collecting the rentals.

Q. Now, finally, Mr. Rathvon, will you just continue and describe to the Court the organization and functions of the theatre-operating companies? A. RKO operates its theatres in two main groups. Those in Greater New York are under the supervision of Mr. James Brennen, as general manager, and all theatres outside of that area are under the supervision of Mr. Sol Schwartz, as general manager of those theatres.

The booking of pictures into all theatres is conducted by our booking company, which is under the direction of Mr. Harold Mirish.

The physical operation of the theatres as distinguished (2197)

from booking, and so on, is under the direction of Mr. Wilbur England. The theatre operation, of course, includes the maintenance and the care of the theatre.

Q. Now, from your description of the RKO organization I gather that the production and distribution activities are not carried on by the same corporations that control the exhibition activities? A. That is right. There is one small exception. Our RKO Service Company does certain clerical work for the RKO-Radio Pictures, but with the exception of that small amount of clerical work, that is correct.

Q. To what extent do the producing and distributing corporations and the exhibition corporations have the same officers or personnel? A. Well, the offices are in the same building, 1270 Sixth Avenue, although the theatre-operating

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departments are on different floors than the distributing departments.

Q. Are the physical offices of the theatre corporations and the offices of the production and distribution corporations the same? A. No, they are on different floors.

Q. I think you misunderstood my first question: I want to know about the officers of these different companies. A. (2198)

Oh, there is a number of executive officers who are officers of subsidiaries that have to do with the theatres and also with the subsidiaries that have to do with distribution and exhibition. RKO is not as large a company as some of the others, and at the top executive level there are four or five officers who hold office in the various subsidiaries. At the operation level, however, that is not so. The operating men in the theatre companies are an entirely distinct group from the operating men in the distribution organization.

Q. Will you tell us, Mr. Rathvon, if you know, the RKO policy with reference to the interchange of information between personnel charged with distribution and those charged with the theatre operations? A. Well, our policy is that there shall be no exchange of such information other than our daily theatre reports showing the amounts the pictures are grossing at given theatres at various dates. Daily theatre reports are available to the distributing organization.

Q. And do the executives have access to this information? A. Well, I, for example, have access to all information. As I said, there were several other executives that have that same privilege. Those executives, however, are not active operating men and we look upon our use of this combined knowledge as important in policy forming, and it is not used in operation.

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Q. Well, does this executive access which you have described in any way affect the decision of the operating per-

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sonnel of the distributing company as to the theatres it will license? A. It does not—

Mr. Wright: If the Court please, that is a speculative matter which I do not see that he is competent to answer.

Q Judge Hand: Well, I do not think it is very convincing merely because it comes from this source; but I will allow it.

Q. And does this executive access which you have described in any way affect the decisions of the operating personnel of the theatre companies as to the features they will license to RKO theatres? A. No, sir.

Q. Mr. Rathvon, can you give the Court any idea of the relative size of RKO in the motion picture industry? A. Yes, I can.

Mr. Leisure: Before you answer that, I am going to ask permission to have marked for identification a chart.

(Marked Defendant RKO's Exhibit RKO-2 for identification.)

Q. Mr. Rathvon, will you just tell us the source material of this chart? First tell us if it was prepared under your direct supervision? A. It was.

Q. And tell us the source material, please. A. Well, other (2200)
than the company's own records we used the Film Daily Year Book for 1945, which is a fairly well recognized source of general industry statistics.

Mr. Leisure: I offer RKO Exhibit 2 for identification in evidence, please.

Mr. Seymour: May I see it?

Judge Hand: Was RKO-1 for identification?

Colloquy

Mr. Leisure: RKO-1 was offered for identification and then admitted, your Honor.

Judge Bright: Has it been admitted?

Mr. Leisure: Yes.

Mr. Wright: I think, if the Court please, we put in evidence a list of the RKO theatres as of December 31, 1944, as Exhibit 158, and I do not know if there are any changes on this. If there are I suppose these ought to go in, but if it is just a duplication, it adds nothing.

Judge Hand: Did you say as of 1944?

Mr. Wright: We had previously offered and there had been received a list of RKO theatres as of December 31, 1944, as Exhibit 158, as supplemented by a letter from RKO's counsel dated July 13, 1945. Now, I do not know whether this is intended as a further supplement or not. If it is I suppose we ought to have it; but if it does not supplement anything that is already in evidence, it seems to me it just adds nothing to the record.

(2201)

Mr. Leisure: May I explain that?

Judge Hand: Yes.

Mr. Leisure: Obviously we are not going to offer anything that is already in evidence, Mr. Wright. The list which Mr. Wright refers to covers all theatres in which we have any interest whatever. Now, Mr. Wright and I have a little private feud on this question of affiliated theatres. Mr. Wright believes if I own 10 shares in General Motors I am affiliated with General Motors. I take the position I am a practicing lawyer and not affiliated with General Motors. His list covers every theatre that we have any interest in whatever. Our list merely refers to the theatres operated by us.

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Mr. Wright: I think the list we put in is broken down so that it shows separately the theatres operated by RKO and then those in which they have other less direct interest.

Judge Hand: Can you do that, or have you done it?

Mr. Wright: I think it has been done in the list we put in.

Judge Hand: All right.

Mr. Leisure: The point I am interested in now with this exhibit and with this witness are the theatres operated by RKO, without any dispute as to stock ownership of 10 per cent or anything of that kind; so I think it is admissible.

(2202)

Judge Hand: All right.

Mr. Leisure: Now, Exhibit RKO-2 for identification has been offered at this time.

Mr. Wright: I would like to examine him on it.

Judge Hand: All right.

Preliminary Cross Examination by Mr. Wright:

Q. Calling your attention, Mr. Rathvon, to this RKO Exhibit 2 for identification, I notice under the heading "Features Released," you have a figure "Total Industry 442." Now, do you know what period of time that covers? A. That is in the calendar year 1944.

Q. Those are the features released during the calendar year, is that right? A. That is correct.

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Q. And when you say "total industry," does that mean total industry in the United States? A. That is the 442 pictures reported as features released within the United States that year by the Film Year Book.

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Q. But you don't know whether those are—are those all features released by domestic distributors, is that it? Does it include features that might have been released and distributed in this country by foreign distributors? That is what I am trying to get at. A. I do not know of any foreign distributors that distribute pictures in the United States directly. I imagine if there are any such they would be part of the 442.

Q. This represents the total number of features actually distributed in the United States regardless of origin, is that right? A. That is what the Film Year Book says.

Q. This is simply taken from the 1945 Year Book, is not that right? A. That is correct.

Q. You did not make any investigation of your own to determine the accuracy or inaccuracy of those figures? A. I did not.

Q. This figure, film rentals received, that represents the film rentals received by whom, that \$469,000,000?

Judge Bright: What was that question?

Q. Question read.) A. That represents the Year Book's (2204)

estimated film rentals received by the distributors who put out the 442 pictures mentioned in the first column.

Q. That again is just a figure taken from the Year Book. Have you got the page reference to the Year Book so that we can see where those things are? A. I don't carry a Year Book around with me, I am sorry.

Q. You don't know the precise part that came from? A. No.

Q. In any event, that was just taken from the Year Book and you made no— A. All these statistics were taken from the Year Book and we take the book for what it is worth as a fairly well recognized source book for industry figures in our industry.

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Q. But there was no attempt to check these particular figures? A. None at all, neither those figures nor the others that are cited from the Year Book.

Q. That is what I am trying to get at: those that come from the Year Book, these figures, theatres operated, in the third column there, 18076, that is also simply a Year Book figure? A. Your questions on any one of the columns are the same, as far as the Year Book, goes on all of them, just taken from the Year Book for what they are worth.

Q. The only figures that came from your records, as to which you had any firsthand knowledge, were these figures which are reflected by the red shaded portions of the chart, is that right? A. Yes.

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Mr. Wright: I must say, if the Court please, I do not know exactly what the purpose of this is. Our own experience is, in such checks as we have been able to make, that the accuracy of these Year Book figures is open to serious question. Now it may not be of significance in view of the purpose, but inasmuch as the purpose is not clear to me, I would press the objection.

Judge Bright: Are we going to have more accurate evidence upon this subject?

Mr. Wright: As to gross admissions and weekly average attendance, there are, of course—the situation, as I understand it, is this, as to gross admissions: of course you do have reasonably accurate figures, I think, in the Government entertainment tax receipts of over-all admissions, but there is no breakdown there as between motion picture theatres and other places of entertainment. I would say that insofar as I know, no one has assembled accurate figures on this question of the gross theatre admissions and weekly average attendance, total theatres operated and total film rentals received.

Colloquy

Judge Bright: We have had three figures already of the total theatres operated.

Mr. Wright: Yes. As far as I know, there are none—I have never seen any which, I think, are recognized as accurate. It is a constantly shifting total.

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It is very difficult to ascertain because houses are constantly being closed and opened.

Judge Bright: Have you submitted any proof on any of the five columns of this proposed exhibit?

Mr. Wright: I don't think we have. We have confined our proof, I believe, in each case to the actual figures produced by the various defendant companies.

Judge Bright: Does your proof show the percentage of each one of these five companies with reference to the totals in the industry on any particular item?

Mr. Wright: No, it does not.

Judge Bright: Does your proof show the totals of the industry in any of these items?

Mr. Wright: We have offered, I believe, no proof of industry totals. I think that is correct, your Honor.

Judge Goddard: Have you cited the Year Book at all as your authority?

Mr. Leisure: It has been constantly referred to.

Judge Goddard: Is that right, Mr. Wright?

Mr. Wright: Have I—

Judge Goddard: Perhaps you did not hear. I was asking you: my recollection is that the Government has cited the Year Book as authority for certain statistics.

Mr. Wright: As our record stands, I do not believe that anything we have in evidence is based upon

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Year Book figures. That is my impression.

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Judge Goddard: Hasn't it, in the course of this litigation, been cited by the Government? I think so.

Mr. Wright: I don't recall, but we may have referred to it. As I say, we have never been able to obtain what we regard as accurate figures setting forth these over-all industry facts.

Mr. Leisure: I think in the constantly shifting total, such as opening theatres and closing theatres, you would never have any two figures that may agree, but may I ask a question which I think will fully clarify this question?

Direct Examination continued by Mr. Leisure:

Q. Mr. Rathvon, is the Year Book to your knowledge a book that is used constantly in your industry and regarded as a reliable book for the information which it is supposed to contain? A. It is.

Judge Bright: By whom is it published?

The Witness: It is published by the publishers of one of our trade magazines, Film Daily.

Judge Bright: Is it published by any of the defendants here?

The Witness: No.

Judge Bright: Or by the group of them?

The Witness: No.

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Judge Hand: We will allow it.

(Marked Defendant RKO's Exhibit 2.)

Q. Addressing your attention to the column on your left, Mr. Rathvon, I would like for you to just start and explain to the Court what the column purports to show, giving the figures as you go down to the last figure, 91.6 per cent? A. The whole purpose of this chart is to show relatively the

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niche that RKO occupies in this industry. I think whether the over-all comparative figures are highly accurate or not, they are certainly accurate enough to indicate broadly what RKO's activities are in relation to the whole industry.

We approach it first from the number of features, showing that RKO as a distributor, released 37 out of the estimated 442, or 8.4 per cent of all the features that were released, and that of the film rentals received, only 7.6 per cent went to RKO as a distributor.

Judge Bright: Do I understand that film rentals received column is film rentals received from features only?

The Witness: I am not quite sure whether those two figures are—if it isn't, it would include shorts, which is a relatively small item.

Judge Bright: Would it cover any of those Trans-Lux theatres where they have just news?

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The Witness: Well, if it includes what I have called shorts, it is news and shorts. I think that means the total film rentals received by the companies for features and shorts as well, but I don't know.

A. (Continuing) The remaining columns have to do with theatres. It shows that we operate 106 out of 18 thousand, or only six-tenths of one per cent of the total. Weekly average attendance: out of the estimate of 95,000,000, our weekly average is 1,844,000, and represents 1.9 per cent of the total. Out of gross admissions collected, it is 2.6 per cent of the total.

On the whole it shows that as a distributor we do around 8 per cent of the business, and as a theatre operator we do around in the range of one to two percent.

Q. Mr. Rathvon, the Butterfield companies have been mentioned here from time to time. Do any of the RKO companies own stock in the W. S. Butterfield Theatres, Inc.?

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A. Yes. B. F. Keith owns ten per cent of the stock of that company.

Q. What is the business, please, of W. S. Butterfield Theatres, Inc.? A. It operates theatres in Michigan.

Q. What is the interest of B. F. Keith in that corporation? A. It owns part of the common stock. There are three classes of common stock, A, B and C. The C stock, (2210)

which represents ten per cent of the total, is owned entirely by our subsidiary, B. F. Keith.

Q. When did B. F. Keith Corporation acquire this stock?

A. Oh, that stock was acquired before RKO came into existence. It was in that company at the time its stock was exchanged into RKO.

Q. Does B. F. Keith Corporation exercise any control over the operation of W. S. Butterfield Theatres, Inc.? A. None at all.

Q. Does B. F. Keith Corporation have any control over the management of W. S. Butterfield Theatres, Inc.? A. No.

Q. And does B. F. Keith elect any directors? A. C stock is entitled to one out of six directors. We have on the board a representative of RKO.

Q. Who is that? A. That is Major Leslie Thompson, who is head of our labor relations department. He used to be in theatre operations at the time he went on the board, but he has now been in charge of labor relations for a long while and we haven't bothered to make a change in the representation.

Q. Based on your experience, Mr. Rathvon, does the stock interest of B. F. Keith Corporation in W. S. Butterfield Theatres, Inc., give any advantage to RKO in licensing features for exhibition to the Butterfield Theatres? A. No. (2211)

Q. The Butterfield Michigan Company has also been mentioned here. Do any of the RKO companies own any

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stock interest in Butterfield Michigan Theatres Company?

A. Yes, B. F. Keith owns $33\frac{1}{3}$ per cent interest in that one.

Q. What is the business of that company, please? A. That also operates theatres in that general area.

Q. What is the interest of the B. F. Keith in that corporation? A. It has a stock interest of about one-third of the common stock. Both of those acquisitions came in connection with vaudeville booking arrangements back in the days when they were operated entirely as vaudeville houses and those securities were resting in the B. F. Keith Company at the time they became part of RKO.

Q. Again, as to this company, does B. F. Keith Corporation exercise any control over the operation of Butterfield Michigan Theatres, Inc.? A. None whatever.

Mr. Wright: If the Court please, I think we have an agreement there which sets forth the relations between the companies, which is the best evidence as to the existence or non-existence of control. A copy of that was given to us after Mr. Beatty of the Butterfield Corporation had testified, and I have sent for it now, but I think that agreement is the best evidence rather than these statements of this man as to what

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the control of the situation is.

Judge Hand: Probably it is. You are going to put it in, I suppose.

Mr. Wright: Yes, I was going to ask to put it in.

Judge Hand: Go on.

Q. Does B. F. Keith Corporation have any control over the management of Butterfield Michigan Theatres, Inc.? A. It does not.

Q. Does it elect any directors? A. It has a director, the same Major Leslie Thompson, who is on the other Butterfield board.

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Q. Based on your experience again, Mr. Rathvon, does the stock interest of the B. F. Keith Corporation in Butterfield Michigan Theatres Company give any advantage to RKO in licensing features for exhibition in the Butterfield Theatres? A. No.

Q. There is another group that has been mentioned here from time to time, called the Metropolitan Playhouses, Inc. Do any of the RKO companies own any interest in that company? A. Yes, B. F. Keith owns a 20 per cent interest in that company.

Q. What is the business of that company, please? A. It is a real estate holding company, its real estate assets being theatre property.

Q. When did B. F. Keith acquire its interest in that (2213) company? A. In 1935.

Q. Will you explain that to the Court, please, the circumstances under which that came about? A. Well, Metropolitan Playhouses is a company that grew out of the receivership of the Fox Metropolitan Theatres. It had been organized by Mr. [redacted] in 1928 and it had been a hastily organized circuit in this metropolitan district here in New York and shortly after 1929 and 1930 the circuit began to disintegrate. It never had any product other than the Fox and half of Warner, I believe, and half of Paramount, and their film rentals were not such that they could hold all of that product, as a result of which it was finally left just to the Fox product to support these expensive theatres, and the operation went into receivership.

After a period in receivership, it emerged as Metropolitan Playhouses, Inc. as far as the real estate holding end of it.

The operation of those theatres, however, during the receivership and afterwards, and I suppose before even the receivership, was in the hands of operating companies.

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Metropolitan Playhouses emerged as the holding company of the theatres of that receivership, and RKO at that time acquired a 20 per cent interest—when I say “at that time”, I mean when the receivership ended—pursuant to a (2214)

contract we had entered into in June of that year, which was approved by the Court under the Metropolitan receivership.

Q. Again, based on your experience, does B. F. Keith exercise any control over the operation or the management of that company? A. No, but that is not an operating company.

Q. And does it have any directors? A. It has one director in nine. Our director is Mr. Malcolm Kingsburg, vice-president and treasurer of our company, who was formerly head of our theatre operations.

Q. There are two groups, Mr. Rathvon, whose names have been mentioned here from time to time, and that is Skouras and Randforce Corporation. What if any is the relationship between Metropolitan Playhouses, Inc. and Skouras Theatres Corporation and Randforce Amusement Corporation? A. Metropolitan Playhouses own 50 per cent interest in each of those companies.

Q. And would you tell us the business of Skouras Theatres? A. Well, it is a theatre-operating company whose activities are confined largely to parts of New York City.

Q. And the business of Randforce Amusement Company? A. It also is the same thing, only their theatres are largely concentrated in Brooklyn.

Q. Do RKO companies own any stock in the Skouras Theatres? A. No. (2215)

Q. Do they own any stock in Randforce Amusement Company? A. No.

Q. By reason of its 20 per cent ownership of stock in Metropolitan Playhouses, does B. F. Keith elect any repre-

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sentatives on the board of either Randforce or Skouras?
A. No.

Q. Does B. F. Keith Corporation have any control over or voice in the management of the theatres operated by Skouras Theatres Corporation or Randforce Amusement Corporation? A. No.

Q. And based on your experience, Mr. Rathvon, does RKO Pictures secure any advantage in the licensing of its pictures to either Skouras or Randforce by reason of the fact that B. F. Keith Corporation has 20 per cent stock interest in the Metropolitan Playhouses, which in turn has a 50 per cent stock interest in Randforce and Skouras? A. No.

Q. Another company: Do any of the RKO companies have any interest in a corporation known as Affiliated Theatres, Inc? A. Yes, RKO-Orpheum has a 10 per cent interest.

Q. How did that come about, if you know? A. Well, that interest was acquired by the—it was an asset of the Mort H. Singer Theatres and it had been acquired by the theatre interests of that organization prior to that time, (2216)

and it came into our possession when we first acquired the Mort H. Singer Company. It is a very small item and it stands on our books at only between 7 and 8 thousand dollars.

Q. I neglected to ask you what the business is of that company. A. It operates six theatres in Sioux City, Iowa.

Q. Does RKO have its own first-run theatres in Sioux City? A. It does.

Q. Are the theatres operated by Affiliated Theatres, Inc. regular customers of RKO? A. No.

Q. Does RKO have any representation on the board? A. No.

Q. And do they buy our product either first or second-run, Mr. Rathvon? A. Not regularly. There have been a

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few spot bookings in the last few years, the only transactions of any kind.

Q. Will you say that the stock interest of RKO-Orpheum Corporation in Affiliated Theatres, Inc. gave any advantage to RKO-Radio Pictures in the licensing of features distributed by it? A. Well, obviously not. They don't buy our pictures.

Q. Mr. Rathvon, from your account of the development of the RKO companies, it appears that RKO from its organization has operated as an integrated unit? A. That is correct.

Q. Based on your experience as president of the company, (2217) does the fact that RKO operates as an integrated unit, including production, distribution and exhibition, offer any advantages which would not be present if the companies were separated? A. Offers very great advantages.

Q. Will you be good enough to outline the advantages to the Court which you have observed with particular reference to the operations of RKO? A. I will. The mere ownership of theatres by a producer distributor, regardless of whether those theatres are first-run or second-run, or any run, no matter what type of theatres they are, the mere ownership of them is a great safety factor and a great stabilizing influence in what is essentially a very hazardous and very speculative business.

For a number of years RKO has received about one-half of its gross revenue from theatre admissions. In good times and bad, a fair share of those theatre admissions have found their way through to net profits.

This theatre business is a stable, predictable retail business. In the last ten years the number of people who have attended RKO theatres, that is, our average admissions, has varied very slightly. In that ten-year period there has been no year when the number of admissions has varied five per

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cent from the average. Therefore, the variation in net profits in the said years have been due to variations in admission (2218)

prices or variations in film rentals, but in every year the theatres have been able to show substantial net profit from those admissions.

Production is entirely another story. With production, well, in 1936 RKO made two million dollars on about 18 million dollars worth of film rentals. Two years later, on a greater amount of film rental, it lost \$570,000. In fact, in the five years from 1938 to 1942, inclusive, RKO lost four million—it was in the red constantly in those five years, and we lost five million dollars on our production-distribution operations, and yet in those very same five years we made nine million dollars profit on our theatre operations.

RKO never could have emerged from the receivership in 1940 if it had not have been for the theatres and the earnings of the theatres and the stabilizing influence they gave our operations. In fact, I am quite confident that RKO would have sunk back into receivership in 1942 if it had not been for the theatres, because in that year we had to pledge our theatre holdings to borrow three million dollars to keep on making pictures.

(2219)

That era of five years, when the theatres, so far as RKO are concerned, supported us, kept us out of receivership and kept us up, were not what you would call bad times in our industry. RKO was suffering particularly in those five years because, coming out of receivership, it had very few production assets, very few stars, and we were struggling to get back on our feet and get on a competitive basis.

The progress we have made in operation in the last few years has been made possible by the stability, and the confidence and the boldness that we could go ahead, because we had these theatre earnings to go on.

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But every so often our industry does run into hard times when all production generally is on an unprofitable basis for a period of time. That has happened historically in the past. It is at times like that when the distributor producer knows that he is faced with a period when his production generally is going to be losing, that the stability and the strength of these theatre earnings are most important to him.

Every time we are prosperous in this industry and the revenue from our producing activity goes up, our production costs go right up along with it, and then when times aren't so good and the curve turns down and crosses this cost curve, why we are in trouble.

(2220)

There are many reasons why we cannot control cost with facility in our business. One is the fact that we make tremendous inventories ahead of the time they are going to be distributed. Most of the companies have pictures made now which will not find their way to the screen for eighteen months or maybe two years. So, in the first place, you have a high cost inventory, that is, high cost in relation to the time that is coming, when we go into one of these periods, I will say; and the things you have in production, you have laid out your costs way ahead of time, on even projected pictures you are in trouble because of the contract system that exists there on labor, and to a certain extent with stars and expensive people. And those pictures, each time one of these periods comes along, it may be said with us, we know we are faced with a situation where production is going to be a losing proposition. When those periods come, these independent producers can readily take cover and go out of business for a year or two because they have no responsibility to keep this flow of pictures going, but the so-called major companies, who are the backbone of this industry, they have just got to keep plugging along, and we cannot cut down on the number of pictures. The minute we slow down on the num-

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ber we are in trouble because in bad times the payoff of the (2221)

pictures are accelerated, run a lesser length of time in exhibition, so you need more pictures instead of less. You cannot cut down in quality in those periods because the motion picture goer is a shopper, he becomes more a shopper at the time when his dollar means more to him, but more importantly still, we cannot cut quality because we have to maintain these foreign markets of ours, and we must keep the quality up, to do that. This industry has enjoyed extensive revenue from foreign markets for so many years that our whole cost structure is based on the expectation of substantial revenue from abroad. For a number of years upwards of 30 per cent of our total revenues, I am talking industry-wide, and it is true of RKO, have come from foreign markets. When 30 per cent of any revenue or any business, of your gross revenue, comes from one source, all your profit and part of your costs come from that source.

So the stability and strength which our theatre ownership adds to us, to our situation, reaches even into the maintenance of these foreign markets and helps permit us to maintain the prestige of the American picture abroad.

So when these hard times come, it falls on the producer, and that is so. The exhibitor does not take up much of the slack or difference between the results of good times and the results of bad times. The exhibitor looks on what he receives (2222)

at the box office as falling into three slots, first, to pay the cost of his operation, second, to pay his film rental, and third, to pay his profit. The only flexible thing in there, from the exhibitor's point of view, is the film rental; so when times are bad, it is the film rental that shrinks rather than the exhibitor's profit or the cost of his operation.

I have tried to present the situation from the purely broad point of view of ownership of theatres, regardless of what the location of those theatres are, the run of the theatres, or any-

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thing of the kind, but when that theatre ownership falls into certain patterns, then it has got a greatly enhanced value to the producer-distributor who owns it.

One of those patterns is the RKO first-run pattern. There may be other patterns, where these extra assets that establish that pattern add extra dividends to the producing and distributing company that owns it, I don't know, but I do know that this RKO pattern is very valuable and enhances the value of our holdings to RKO, and that pattern is inherited from vaudeville. It is the chain of theatres located, well managed, big theatres located in big cities, one or two to a city. It is a thing that we have—that has been spoken of largely as a showcase operation. It is more than a showcase, it is a demonstration center of great importance to the producer-distributor. (2223)

What happens in the first-run key city engagement tells the story of what happens in a great many engagements that follow that, and for that reason that key city engagement is a very important one. If the engagement is a success, the producer-distributor gets subsequent rentals that he is entitled to with a successful picture. The exhibitor can buy the picture with confidence because success has been proven.

If the effort is a failure, well, the exhibitor is the only beneficiary then because he finds ways not to buy the picture or he buys it on his own terms. This exhibitor is a pretty conservative fellow. The average exhibitor, he wants nothing but the so-called automatic picture, with two or three fine star names based on distinguished books and plays. The producer has learned that he can make only a few of those in a year and he cannot make the rest of his program a spurious facsimile of his good picture. He has to reach out and try, if he is going to hold his public, he has to take terrific gambles with new ideas. Always, the producer is the fellow who must

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go out and gamble with something fresh or new to hold the motion picture public and keep up his attendance in our theatres. Constantly he must try to build unknown people into stars because there are not enough stars for our pictures. As a result of that, when we make pictures costing a million (2224)

dollars and upwards, the gamble that you take when you make these guesses as to what the public wants, are always tremendous gambles. The producer has got to find out, at great expense, whether the public likes what he thinks they are going to like, and he may or he may not be right, but that is the gamble he takes.

Now, if the company that has taken those gambles, this producing company, has access on the terms of playing time and timing to these important first-run theatres, they have got something that goes a long way to mitigate that gamble.

In the first place, if you have got an unsuccessful picture, your first-run outlets that you control let it get into the flow of distribution and that is very important, because if you have an unsuccessful picture and your first-run exhibitor has no responsibility to you, you are foreclosed from that whole territory if you fail to get it into first-run theatres. So it is, for your unsuccessful pictures, it gives you a chance to get some revenue back because you forced it into the flow of distribution. On your more successful pictures, or on all pictures, these first-runs are of particular value in what we have come to call the setting up of the picture, establishing the prestige of the picture, getting it set for that territory.

(2225)

At least, if you can handle the exploitation, if you can time your releases and so on, you know that these gambles that you take won't bog down from poor timing and poor exploitation.

I have talked—answered at considerable length. I would like to give a few examples of the type of thing I mean.

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Q. Will you please. A. That gamble that the producer takes and what it means. I will give a few examples. Walt Disney, up until some years ago, made nothing but so-called short cartoons. I know that they cost him around \$50,000 maximum to make these cartoons. He conceived the idea some years ago that the public would like to see full length animated pictures and he found when he got making it that he was gambling a million and a half dollars—that is the alleged cost of the picture; I don't know what it actually was, but in any event RKO was his distributor, so we undertook with Mr. Disney to make that gamble a success. A great many of the exhibitors throughout the country, when they heard this picture was forthcoming, were quite sure that the picture public would not sit through a full length cartoon, but a very elaborate campaign was worked up, the whole thing was carefully set up and established, and I must say in that case it was not a hard case to convince the exhibitors after a few showings that the public was very much—very (2226)

much wanted to see a full length cartoon, because it became the greatest grossing picture of its year.

Judge Bright: What was its name?

The Witness: That was Snow White and the Seven Dwarfs, the first Disney cartoon that was beyond one reel that was ever made.

A. (Continuing) I would like to give a less spectacular example of a very recent one in my immediate experience, to show another type of gamble we took. RKO has not got many stars. We have to reach around and find them where we can get them. We try to build them but that is a matter of great difficulty and takes lots of time, so we comb the field over sometimes behind some of the others.

There was a young, or a man in Hollywood named Dick Powell, who had had a career as a singing juvenile. He

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played in musical pictures. He attained quite a degree of popularity and then his popularity waned and he was pretty well forgotten in Hollywood. I think he could have gotten in some job as a singing juvenile, but he conceived the idea that he could come back in an entirely different type, the so-called hardboiled Humphrey Bogart type. Well, who could tell? It required a gamble, and we decided to take the gamble with him and make the picture.

If we had announced the picture with Dick Powell the
(2227)

public, in the first place, would have assumed it was a musical picture and, in the second place, they would have stayed away from it, so our whole campaign was based on the new Dick Powell. We did not depict him at any time without a gun in his hand, and we played this character up and advertised him, so on, until we created public curiosity as to what the new Dick Powell was. In our first-run we launched that with a handmade campaign, which we controlled, we launched that picture and it turned out, for its cost, a very successful picture, so much so that we have finished a second picture with Dick Powell and we think we have got a, not a great star, but a star that we can count on as a steady earning star for a long time to come.

I could give you a lot more examples but I think those two examples will illustrate what I am saying.

Q. You have laid great emphasis on the importance of the producer having control of the first-run for the purpose of setting up his picture, of establishing their prestige. To what extent do the early engagements contribute to the success of the picture? A. The early engagement contributes very greatly to the success of the picture, and I am thinking more of the exhibitor than I am of the public generally because the grosses these early exhibitions make are published
(2228)

in trade papers and they are picked up all over the country

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by exhibitors and the picture gets characterized as a big grosser, or a medium grosser, or some other kind of grosser. Exhibitors, like motion picture audiences, will hear a picture is good or they hear it is not good, and that tells whether or not, in their minds, as to what that picture is. So these early runs, particularly in their effect on the exhibitors of the country, are very important.

Q. To what extent does the national campaign and exploitation contribute to the success of the early engagements? A. Well, of course, the whole exploitation idea is to get people to know about your picture; they may not like it, but you get them to know about it. That is step number one, and your whole national advertising campaign is the first step in that thing, and you play it as far as you can up to what we call penetration, that is, the percentage of the movie going public that know about this thing, so your national campaign of advertising and exploitation in articles in magazines and everything else you can do carries you up to the point where the local campaign, the point where you hold your first exhibition, comes in. When they come in, they add the additional penetration on top of what you have built up on your national campaign. And our experience is you can build up more in local campaigning than you are (2229)

able to build up in your national. In other words, the total amount of penetration you get will come more from your local campaign than from your national campaign. I am talking only of important pictures because those are the only ones we advertise extensively nationally.

As far as the less important ones go, they get all their penetration from the local newspaper campaign and local exploitation.

Q. What have you to say as to this, is local effort more effective where the early exhibition is in a theatre operated by RKO than it is in a theatre not affiliated with RKO? A.

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It has been my experience, particularly when we have good pictures that require special handling, we do very much better in theatres operated by RKO. That Dick Powell picture I cited a little while ago would be a good example, where, in our own theatres, and with special effort, we do these things.

Q. Do you have any factual data, Mr. Rathvon, which confirms this? A. Yes, I have accumulated a great deal of data from time to time on the relative importance in relation to specific pictures and groups of pictures on this matter of penetration. In fact I have been at it for a long while. The story goes back to eight or nine years ago, when Dr. George Gallup conceived the idea that he might apply to the amusement business the ideas of market sampling that (2230)

he has used in other fields, and he experimented with this for a couple of years, and at the end of a couple of years he decided that it did have some valid application, and at that time RKO and Gallup got together and made arrangements whereby he set up a special organization known as Audience Research Institute, and we have been operating with them for over four years. It is an extensive organization; we spent a great deal of money on it. And at first we were concerned only with production items, things like the rating of stars, who were popular, who were becoming popular, and story tests, and trends of public taste in stories, but as time went on we got into marketing problems. As we got into the marketing problems we began to find these factors I have been talking about. We began to be able to evaluate them and we learned a lot, and the system that we have followed, which I think demonstrates not only the importance of first-run engagements, but demonstrates what it means when you have those first-run engagements or under arrangements with you that you can exploit the pictures the way you want to—I think an examination of the results

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of what we have done demonstrates that on a dollars and cents basis. In other words, we can show with our own exchanges and our own exploitation, and especially where (2231)

we can accomplish results, that where a picture gets off to a mediocre—as against a picture that gets off to a mediocre start, outlets of different types, the results run into hundreds of thousands of dollars.

Mr. Leisure: I have some charts, Judge Hand, over back of those cases, and if we can adjourn now, it will save the time of the Court, I believe, if we get them out during the noon period.

Judge Hand: We will adjourn until two-ten.

(Recess until 2:10 p. m.)

(2232)

NATHANIEL PETER RATHVON, resumed the stand.

Direct Examination continued by Mr. Leisure:

Q. Mr. Rathvon, before lunch we were discussing the importance of key first-runs and the added importance of the runs in your own theatres. I think you said that you had certain factual data with regard to that? A. I have.

Mr. Leisure: I ask permission to have marked at this time a chart for identification.

(Marked Defendant RKO's Exhibit RKO-3 for identification.)

Q. Now, Mr. Rathvon, would you just please explain the type of information developed in this research? A. I had mentioned before the recess the use of the Audience Research Institute, this organization which we caused to be set up with Dr. George Gallup.

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The purpose of this chart is to show how it works, because from the data that we gather we arrive at the conclusion of the importance of the key first-runs and also the importance of having those key first-runs our own first-runs.

In regard to every important picture we try to find out two factors, and it is on the knowledge of those two factors and the interplay of those two factors that we draw these (2233) conclusions.

The first of those factors we call "want-to-see". Want-to-see simply is the percentage of the movie-going public that wants to see a picture. Thus, if we say that the want-to-see of a picture is 72, it means that 72 out every 100 movie-goers want to see the picture.

Now, after checking and testing hundreds of pictures over the last two years we find that the average want-to-see vote on A pictures, or the important pictures—let us take the top hundred of any given year which we test and study—is 72. That is the average.

Now, we arrive at this want-to-see by a very elaborate system of tests that begin way back when the picture is an idea, and go on through to the time when we show the picture actually to cross-section audiences. And it is the composite of all those tests that make up this final want-to-see, which on the average of these tested pictures is 72.

Now, that is only shown in the chart over on the left with the black, with the thermometer-like figure there, and the black shows the average, and the blue and the orange show two different types of want-to-see votes that we have taken.

We finally consolidate those into one on our ordinary study of this thing, but this chart was made up at a time (2234) when we were using two different ones that had not been consolidated.

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In one system it arrived at a 73 and another at a 75 at that particular point. But this picture *Enchanted Cottage* we therefore knew was slightly better than the average on the basis of the public interest in the picture.

Now, the other factor that we strive to find out about every picture is this thing called "penetration", which I mentioned earlier, which is simply the percentage of the movie-going public who know about a picture at any given time. So if we say that the penetration at some given point is 25, we mean simply that 25 out of every 100 movie-goers know about the picture, can prove they know about it by identifying it.

Now, the penetration is the guiding star and the paramount figure all the way through in these studies. It obviously is never a constant figure, because as the picture goes on through its production and its distribution, and more and more of the public come to know more about it, the penetration figure is bound to rise. Therefore it is a moving figure. We are very interested in that figure from the very time we start a picture right up until we finish, because it shows how many people do know about it, and then in conjunction with the want-to-see we can tell pretty well the size (2235)

of the audience we have to deal with.

Now, in this particular chart the green line is this penetration.

Now, I must first describe the heavy black line that is crossed by the green line, because a moving figure like penetration has got to be considered in relation to some constant point. In our early experiments we would use the date of release, the date a picture was released anywhere, and we found that that was not a satisfactory constant to use simply because pictures have their initial release in so many different ways. Some pictures are released in ten cities at once on their initial release; some in twenty; some in one. So in

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the search for a constant we finally arrived at a point when a million people have seen the picture, that give us a fair comparison. In other words, all pictures can be considered as against that constant rather than the date of the initial release.

So you see on this particular chart we picked up the want-to-see line back several months before the picture was actually released.

Q. When you say "want-to-see line," do you mean the penetration line? A. I mean the penetration line. The want-to-see line I will not mention at this point. It is the green line (2236)

which is the penetration. At the time we picked it up it had a penetration, you can see, of one or two, meaning only one or two out of every hundred movie-goers at that point had heard of it. Probably at that time there had been some articles in fan magazines, and so on, so some of the more ardent movie-goers knew about it. And that line, therefore, did not begin to change until we got much closer to the time of release.

Now, you will notice it starts upward at a point where the red lines come in. Those red lines represent our national advertising campaign, and the height of each red line represents the circulation of the combined magazines used in any week. The first of those red lines was the first week we had any advertisements of those pictures, and if you will look at the key at the right, it tells in which magazines those advertisements appeared—Look and Movieland.

Q. Excuse me, Mr. Rathvon. Those are the red lines at the bottom righthand corner you are talking about? A. That is right. That is correct. Those lines of varying height—

Q. Represent national advertising? A. Yes.

Q. And is the key over on the right those typewritten numbers? A. On the right, and as to the media that we use in our ads; but right beside the red lines is a circulation indi-

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(2237)

cation so that you will know what circulation was reached by the magazines at any given week.

You will notice in the first week with Look and Movie-land we reached a circulation of about a little under two and a half million; the second week that we advertised, using five different magazines, that came above four million. The third week we hit a higher number with Collier's and Woman's Home Companion; and the fourth week the highest of all, with another combination. And then the rest of it, it shows the circulation reached.

Now, naturally, the penetration goes up under the impetus of this advertising; but the effort up to this point is national in its character. We have now reached or we have expanded our national campaign, and we have brought this picture up to a point where it is about to open in various cities.

In those cities we then start our local campaigns. As I testified this morning, on the strength of what we have learned from those studies, you get more penetration on the average out of your local campaigns than you do on the national campaign.

Now, the point at which the orange and purple lines begin on this chart is where the first showings took place. This picture opened between April 18 and April 26 in a list of cities that are shown here on the chart near the top, with a

(2238)
date, and those were the first-runs that opened the picture.

Now, the minute we have started to show this picture, our penetration, which up to that date has really represented the national effort, now breaks itself into two parts, because in areas where the picture has been shown we have naturally a higher penetration than for any areas where it has not been shown. Therefore we begin to show on our

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chart, instead of one line for penetration, we now show two. The purple line at the top starting with the April 18th date shows what the penetration was in those cities where we had opened the picture. The orange line shows the situation in the rest of the country. The green line, or the point of starting of these other lines is simply a composite of those two.

Now, the important thing here is the fact that the national campaign had brought this picture up a little better than 25 before we had these first openings, and due to the strength of our local campaigns in the cities in which it opened, we opened with a penetration of 55. That shows where the blue line begins. Therefore we know that we accomplished about half of the penetration which we got when these pictures came into those first-runs by our national campaign, and the remainder, the greater part is as a result of the local campaign.

I think that outlines the various features of this chart.

Q. Would you just tell us, Rathvon, now how this information is utilized in planning the distribution of RKO pictures? A. Yes. We utilize it, of course, in a great many different ways; but the principal way first is to check the potency of our national campaigns, and then we check whether our local campaigns are adding as much as they should to a picture, because penetration to us is the important thing.

I think I can illustrate that, I can show that best by using an illustration: We will assume a city with a hundred thousand movie-goers, and assume you have got a picture with a want-to-see of 80; you have got an important picture, because that is well above the average of 72; and we go into these first-runs and we find as we go in, let us say we have a penetration of 40. That means that only 40 out of every

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100 movie-goers in that town know about it, and we know that 80 per cent of those want to see it.

So our theoretical audience is 80 per cent of 40 per cent of the hundred thousand movie-goers in that town. In other words, our theoretical potential audience is 32,000 people. (2240)

I call it theoretical because many things^o affect it,—the weather, competing entertainment, the type of theatre that you are able to get in, and many other factors. It is only a theoretical.

But let us assume you have another picture with the same want-to-see of 80, the same number of people, but you are able to attain only a penetration of 20. That means only 20 out of every 100 know about it and only 80 per cent of those want to see it, so that you have a theoretical potential audience of only 16,000. Therefore you can see your potential audience is only half as great, and I think that illustrates as graphically as I can illustrate the value of penetration. And it is on penetration that our whole exploitation program is based.

Mr. Leisure: I offer the chart in evidence.

Mr. Wright: If the Court please, I am completely lost on this one. I haven't the faintest idea as to what this is offered to prove in relation to any issue in the case.

Judge Hand: I suppose it is the kind of theory that he was expounding before in his oral testimony.

The Witness: If the Court would permit me, I will elaborate that example I used and perhaps give a little better answer.

Mr. Wright: I take it there is no dispute as to the importance of control of these key first-run the-

(2241)

atres as between the defendants and the Government.

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Judge Hand: Proceed, Mr. Leisure.

Mr. Leisure: Yes. I offered it.

Judge Hand: Oh yes, that is admitted.

(Defendant RKO's Exhibit RKO-3 for identification received in evidence.)

Q. Does the operation of showcase theatres by RKO make more effective its distribution activities based upon this extensive research, would you say? A. Very much so, yes. I can illustrate that by using again an example of the city with a hundred thousand movie-goers, and a picture that want-to-see indicates is going to be a very important picture. Now, let us assume that we spend a substantial amount of money on a national campaign, and let us assume, as we have to find out sometimes, that it was not a very successful campaign; that instead of attaining the average of 25, which is the average we hope to attain, we attain only an average of 15. Now, we know we should have 50 or 55 if we are going to do that picture justice, but we have only got an average of 15. That means when we turn to our local campaign we must put on special effort, because if we fall down on that we fall down on penetration, and our picture gets off to a bad start.

So the first thing that would happen is that one of our (2242)

field exploitation men would go to the exhibitors of the first-runs where we expect to run this, and try to induce them, on the representation that this is an important picture, to assist him in developing a high local penetration on this thing.

Now, he may propose an early advertising campaign in newspapers; he may propose spending a lot more money; he may propose that an extra trailer run earlier, a teaser campaign, and various other showmanly activities to try to build up the penetration of the picture.

Now, if he goes with that picture into an exhibitor who is just taking a picture every week or two and is not particu-

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larly concerned with it, he may get a very indifferent reaction to this urging of his to get this picture into the flow of things with the proper penetration. It will depend a lot on the type of exhibitor he is talking with. If he is a good showman and wants to cooperate he probably will; but if he is not, and he has got a fishing date, he probably won't. If he has to spend any money or work very hard about it, the chances are he will not cooperate.

And let us assume then that instead of attaining the 55 we could expect, we attain only 35. Now, it may appear a very tiny thing that the difference between the penetration of 35 and 50 in one key city first-run is not very many dollars, (2242a)

but that is the tiniest part of the damage that is done by not getting the penetration you should have, because right away that picture becomes characterized as a picture of the lesser type than it should be if you had the right penetration. (2243)

As I said this morning those figures in those key first-runs are published in the trade newspapers. They are picked up by exhibitors all over the country, and not only those exhibitors who play subsequent runs to this particular community, but first-run exhibitors in other communities come to characterize that picture on the basis of this first-run; and we have found time and time again that an indifferent exploitation in the early key runs can mean hundreds of thousands of dollars in the final gross of those pictures.

And when we can take them into our own first key runs and give them the proper exploitation, when we see a great gap coming between the penetration we have and the penetration we ought to have as we go into those key first-runs, why, we can turn our people loose and put on the proper exploitation campaigns to bring it up there.

Q. Now, Mr. Rathvon, you have told us the importance to the distributor of the key first-run showings from the

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point of view of setting it up or establishing its prestige. Does the distributor expect any other value from that? A. Very much so. Besides the prestige and the setting up of the picture, the distributor is entitled to a substantial rental from his first-run.

Q. Could you give the Court any idea of what percentage of national gross of an average important picture comes from these so-called key first-runs? A. Well, I am not quite sure (2244)

what "key first-runs" means for the purpose of your question. I have heard discussed here a group of 92 cities having population of 100,000 or more, and for purposes of convenience I imagine that is a suitable barometer of first-runs. Actually there are several cities in those, in that list of a hundred, that are not properly key first-runs. There are several cities there, such as Yonkers, New York, that are near great metropolitan centers that are not, for film purposes, considered key first-runs. On the other hand, there are great many smaller communities in less populous states that have not populations of 100,000, but are key first-runs for the purpose of selling our pictures. So I can't give you any very accurate figures on that. However, I can give you some figures along the general line that I think will illustrate very clearly the importance of that.

Q. What do those figures show, please? A. Now, these are figures that were primarily put together over the past by Audience Research Institute for other purposes than this, which I think serves to show the importance of this situation.

The average A picture, the kind I have been talking about here, Audience Reaction find has 18 million patrons. In other words, when you have got an average A picture, you can expect it will play to 18 million patrons— (2245)

Mr. Wright: Excuse me just a minute. Now, if the Court please, we are going into a field where he

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is simply retailing second-hand information as to something Audience Research has done.

Judge Hand: Well, I shall let him give his philosophy here. I think, however, he is doing it at great length, and it is really by way of argument—

Mr. Leisure: I will make it short, Judge Hand.

Q. This research you have discussed, do you use it every day in your daily work? A. Yes.

Q. And it contains facts that you rely on and you form judgments on? A. Definitely.

Q. Does it? A. Right.

Q. Will you continue, please? A. Of the 18 million patrons who see an average picture, four million of them see them at 110 theatres, at an average admission price of 65 cents. The other 14 million pay an average admission price of 38 cents, and see it in all the rest of the theatres in which it plays. It might be eight or nine or ten thousand theatres.

Mr. Wright: If these figures are offered for any purpose as being valid in themselves, we certainly object to them. The mere fact that they are figures in his files that he gets and he relies on does not make them competent evidence of the facts he is reciting

(2246)

here. If we are going to have those figures, and if they are important, they ought to put it in by the representative that compiled them.

Judge Hand: What about that, Mr. Leisure?

Mr. Leisure: Well, he is really giving the figures he relies on. He is not giving the figures as being facts. They are not offered for that purpose. He is merely showing the figures he relies on. We are not offering it as to the truth of the assertion as to

Colloquy

whether the figures are correct, so there can't be any objection to hearsay on it.

Judge Hand: Well, I should think that that would only be competent on cross-examination if you were attacking his testimony. I do not see why he should give the figures that he relies on. He does not know anything about them, whether he relies on them or not.

Mr. Leisure: Well, he is giving such figures as he relies on, and he is going to tell us now what he does as a result of that.

Now, I am not offering the figures as to the truth of the figures; I am not interested in that. He is merely telling us how he operates.

Judge Hand: I must say I do not see its relevancy.

The Witness: Well, if your Honor please, these
(2247)

figures show to me that 45 per cent of our film rentals come from 110 theatres, and those are, naturally, mostly the first-run theatres.

Judge Hand: Well, go on.

The Witness: I merely want to show that the first-run rental is the substantial rental as we get it, and that is the type of rental we should get; and these figures lead me to believe that 45 per cent of our total film rental in an important picture comes out of the first 110 theatres in which it is shown.

Judge Hand: Haven't we got exhibits stating all this kind of thing in evidence already?

Judge Goddard: This relates to your own pictures, does it not?

Mr. Leisure: Yes, we are talking about RKO. This is our first day in court, your Honor, and I do not think we have been able to give this.

Judge Goddard: I do not think this is in.

You have not put it in, Mr. Wright, have you?

Colloquy

Mr. Wright: If the Court please, we offered, of course, these interrogatory answers for the express purpose of showing the degree of concentration of revenue of each of these distributors in the first-run houses; and I certainly do not see what the advantage is in dealing with some other figures on which we have no check, where there is nothing in evidence—

(2248)

Judge Hand: I do not either.

Judge Goddard: These are his own figures on his own pictures.

Mr. Wright: We have the precise rental data on a selected feature for his company in the 1943-44 season.

Mr. Leisure: Perhaps I can ask a factual question that will clear it up, if the Court please.

Judge Bright: You mean, Mr. Wright, that your proof shows how much revenue they received from first-run and how much from subsequent-run on any particular one picture.

Mr. Wright: Yes; we selected the highest grossing, or I believe, the picture with the maximum number of exhibitions for the 1943-44 season from each distributor, and then had tabulated the actual rental received from that picture in the first-runs in all cities of over 25,000 population, showing the particular engagement and the rental for each of those first-run engagements in all of those cities.

Now, we assume that that would give us a typical picture, and, as I understand it, there is no claim that the percentages that would be obtained from that sample are misleading? I take it there is no purpose in this, is there, to show the data that was offered in

(2249)

response to interrogatories is somehow unusual or not representative of what has occurred before or since?

Colloquy

Mr. Leisure: No

Judge Bright: As I understand what he is testifying to now, he is comparing what he gets from first-run as compared to what he gets from subsequent runs.

Judge Goddard: On RKO pictures.

Mr. Wright: I thought it was a little more than that. He was talking, as I recall, about the key. He said he got 45 per cent of his revenue from 110 key first-run theatres. Now, as I say, as to this one picture, we have the same data in more precise form; that is, showing exactly the first-run theatres in the towns of over 25,000 population.

Judge Hand: Yes, but have you got the subsequent runs?

Mr. Wright: Only as it is reflected in the total. We have in evidence the total revenue received domestically from the feature from all runs. That is right.

(2250)

Judge Bright: I thought his information went a little further. You have a dollar value of the first run and he is saying it came from a limited number of theatres.

Mr. Wright: Our data also shows the exact distribution of that dollar value among the theatres which play it the first-run, and we also show the overall number, the total number of exhibitions and the total film rental received from all runs in the country. We are both aiming at the same goal, as far as I can see, proving the same thing, essentially, but it seems to me it makes a confused record if we get into these generalities when we have actual data in the record which is susceptible of more accurate analysis.

Mr. Davis: It seems to me a long time ago, but your Honors may remember that when I was introducing proof on behalf of Loew's I put in a chart

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which showed exactly this distribution of revenues, which I take it is what this witness is now undertaking to do for BKO, and that chart showed the first runs, and the second and third and fourth, and the subsequent runs, if I can call it back to your Honors' memory, although, as I say, it seems to me a long, long time ago.

Judge Hand: Yes, painful end of it.

Mr. Leisure: Someone said, Judge Hand, this is the fifth run.

(2251)

Judge Hand: It has been suggested that equity is equality, or something like that, and I think we would need the same consideration, but do cut this short. It is very confusing with all these exhibits.

Mr. Leisure: I will do that.

By Mr. Leisure:

Q. Judge Bright just made a suggestion a moment ago, Mr. Rathvon, as to the first-run, and I want to ask you what percentage of your revenues do you try to get from your first-run theatres—in key cities, of course? A. Percentage of the total revenue that we get on the picture?

Q. Yes. A. We feel we are entitled to a very substantial part of our revenue. There is no one figure we shoot at. The point I have been trying to support here is simply that the key first-runs yield a substantial part of the revenue of any important picture. That is all I have been trying to support.

Judge Bright: There is no dispute about that, is there?

Mr. Wright: No, that is what we attempted to show in the first instance through the interrogatory data that we offered.

Judge Hand: It is reiteration.

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Q. Mr. Rathvon, I want to take up New York in a minute but before we do that, you have described the key first-run (2252)

theatres as the de luxe operations of showcase theatres designed to introduce your films and to draw a fair proportion of the revenue from any exhibit area. Are all your theatres key first-runs of this type? A. No.

Q. What, if any, are the notable exceptions? A. Our holdings in Cincinnati and in New York City.

Q. Taking up Cincinnati, would you describe the Cincinnati situation, please? A. In Cincinnati we own or operate nearly all of the first-run theatres and in the theatres which we own and operate the product of nearly all the major companies, or rather, I should say, nearly all the products of all the major companies are played by our theatres.

Q. Do you see any advantages to the RKO type of theatre operation from the ownership of these several first-run theatres in Cincinnati? A. Well, in our pattern of operation, with emphasis on this form of vaudeville setup, with one or two key theatres in each important center that we can get in, the Cincinnati operation is of no particular value to us. From my own point of view, I would rather have five or six of those theatres in some other cities where we are not represented as key first-runs.

Q. You said you would like to have them—how did you acquire them? A. That goes back to, again, before the be- (2253)

ginnings of RKO when that central group of theatres in Cincinnati were in a single control.

Q. In other words, you inherited them? A. We inherited them in a compact group, handling the product of nearly all the companies.

Q. Coming back to the New York situation, I have some charts here.

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Mr. Leisure: I would like to have them marked for identification if I may. There is really only one map, it being New York City.

(Marked Defendant RKO's Exhibit 4 for identification.)

Mr. Leisure: I have four maps there, if the Court please. It is really only one map, that being New York City, but we had to divide it into the four Boroughs where the theatres are located.

Q. (Continuing) Mr. Rathvon, would you just explain to the Court the sources of the information on this Manhattan chart? A. This map shows the location of theatres in New York City; the size of the circles indicating the theatres shows the run; the larger circle the first-run; next size circle, second; and so on. The color of the circles on the map indicates their ownership.

Q. This legend up here describes the different size circles, is that right? A. That is right.

Q. The larger circles indicate what, please? A. That is (2254)

the first-run, the Broadway first-run in New York; the next size, the second run; and then third and subsequent runs.

Q. What do the different colors indicate, please? A. The ownership of the theatres. In other words, the one at the top here is RKO, and the circles of that color are theatres which RKO operates in Greater New York; the next one is green, shows Loew's; next, Paramount; next, Warner; next, Fox; and then others. Those we classify as independent are shown in red.

Q. And the headings there on the left— A. That is a key to indicate—there are numbers on those theatres and that key indicates the theatre, the size of the theatre also being indicated there.

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Q. And this center part here, that is taken right out of Manhattan, what is that? A. That is the so-called Broadway district, where there is a concentration of New York first-runs.

Q. And you gave what the colors indicate? What the colors indicate, have you given that? A. That is correct. I went through those colors, and you can see them apply it there, as far as Broadway first-runs are concerned. I understand that the red—

Mr. Proskauer: Does red in the middle show independent first-runs in the Broadway area? Is that
(2255) what you said?

The Witness: Wherever red appears, it is an independent run; smaller red ones indicate subsequent runs.

Q. The double numbers, have you explained those? A. One is the key to the name of the theatre and the other is the number of seats of the theatre.

Q. Mr. Rathvon, you have indicated in each situation you attempted to have one theatre that accomplishes two things, one that gives you the prestige you want for your picture, and, second, that gives you the revenue that you want for that particular picture. Have you such a situation indicated there on Manhattan? A. Yes. It is a modification of what I have called the sample showcase formula, because it is obvious, as you get into larger and larger communities, a single theatre, showing a given run, will get a lesser percentage of the revenue from that larger area than will a theatre of comparable size in a smaller community, so that this single showcase theatre is subject to modification as you get into larger and larger communities. In fact, when you get into cities above two millions, if you hope that your

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first-run will get anything like the revenue a first-run is entitled to, there has got to be substantial modification.

In the City of Los Angeles, a great sprawling city, spread over a wide area, with many centers of heavy population, it (2256)

has taken an entirely different pattern from New York. There we have what we call multiple first-run; in other words, two, three, even four first-run theatres playing the same picture at the same time. In that way you not only build your picture, and set it up, as we say, but you get an adequate revenue from the size of the territory.

New York is very different from Los Angeles. Our first-run concentration is all in one spot, so we cannot have multiple first-runs in order to get the revenue. So Broadway has come to be a place where you set up the prestige and get the penetration on your picture but you do not, except in rare instances, get a revenue that means anything to you for this great first-run area. And RKO is a typical example because we have of all those Broadway houses just one. It is the Palace theatre, a house well located, but it is a former vaudeville house, has only 1667 seats, it has got two balconies, and we depend on that to set up our pictures. Occasionally we get a picture in another theatre of the same type, or once in a great while we get a picture in the Music Hall.

As far as Broadway is concerned, if you want revenue, you have but one chance to get it, and that is to play a considerable length of time in a very large theatre. If Radio (2257)

City Music Hall, plays a picture for eight or ten or twelve weeks, the distributor gets a pretty substantial revenue out of it. Whether it is commensurate with the size of this great area, I don't know, but it is certainly a substantial revenue. Some of the other, bigger theatres, of course, will get some revenue. You can take some of the smaller theatres and play

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two pictures for three or four or five or six months and you can get a fair revenue.

Two independent producers recently rented a theatre on Broadway in which they expect to show just four pictures a year, in the hope that they will get some revenue out of Broadway that way, expecting pictures to run a minimum of three months. RKO with its one little theatre, and having its full program showing, and being unable to get its pictures in the larger theatres—the Music Hall is our only chance and we have had one picture each year for the last two years there—we must use the Palace theatre and we cannot keep pictures there so long that we clog up the flow of our pictures. So as a result, we show our pictures there for two or three or four weeks and almost invariably we spend on advertising all the rental we get from that picture, and very often more. So that by the time our pictures move out of the Broadway first-run, we have gotten none, or substantially no revenue from them at all.

(2258)

So that in a place like New York, or, let us say, in New York, because there is no other place like it, Broadway sets your pictures up, gives you the prestige for all the rest of the territory, but there must be some way to get this quick, concentrated revenue which is customary in the first-run, and in New York that is done by this so-called second run. That second-run is a very fast playoff. A picture moves into this so-called second-run, either into the RKO group of theatres or into the Loew group, where they play only five, very seldom more than five, days, and then with the clearance of only seven days, sometimes five, some with no clearance at all, they move into the subsequent runs.

The situation on Broadway is complicated to this extent, that picture after picture runs for many weeks and they play off in odd ways. There may be weeks when no picture moves

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out of Broadway; there may be other weeks when five or six have finished their Broadway run. Therefore, if they all move out of Broadway just as they finished, you would have six pictures, maybe, moving one week, two the next week, none the next and none the next. So that what happens, at least two a week are needed to flow out into this orderly second and subsequent-run setup, so that sometimes a picture will move right off Broadway into second-run; sometimes it will be held up for months before it moves, but (2259)

Broadway, itself, is a sort of pool. The pictures play there, wait there, and then two a week move out into these runs, and once they have moved out into these runs they move into subsequent runs in a fairly orderly manner.

Q. And the blue dot represents the Palace? A. That represents our only Broadway theatre, which is the Palace.

Q. And the red ones represent the independents? A. That is right.

Q. And this is lower Manhattan and this is Upper Manhattan (indicating)? A. That is correct.

Q. And these small blue ones that you have here are your— A. Those are the RKO theatres in our second-run group, showing their location on Manhattan.

Q. You have been testifying as to Manhattan. Does what you have said with respect to Manhattan, Mr. Rathvon, apply to the other boroughs in New York City? A. That is correct. The run pattern goes out through Brooklyn, the Bronx, Queens, Richmond, just the same as it does in Manhattan.

Q. And you try to accomplish the same pattern in exploitation in Brooklyn as you have described already in Manhattan? A. Yes. The location of the RKO theatres is interesting in that it also is a heritage of vaudeville and it also shows how it develops for the community. The greater

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(2260)

number of those RKO theatres are former vaudeville houses. Vaudeville, just like first-runs today, in smaller communities, there would be just one in the community non-competitively playing vaudeville. New York City was so large that it supported a group of vaudeville houses separated into the larger neighborhoods of New York, and that is the pattern of the RKO second-run chain. They are more or less strategically located. It is on the old vaudeville formula. Our 41 theatres that play this run are spread all through the Boroughs of New York.

Q. And I understand that the same testimony will apply to the other boroughs— A. That is correct.

Q. —of the Bronx and Queens, is that right? A. Yes, sir.

Q. And the same designation as to coloring is true so far as the maps are concerned? A. That is true.

Q. The light blue is RKO. And this is the one of Queens. Your testimony applies the same as to that? A. That is correct.

Mr. Proskauer: I hope the Court can see red on some of those charts.

Judge Hand: What?

Mr. Proskauer: I suggested that I hoped your Honors would see red on some of those charts.

(2261)

Mr. Leisure: I offer the maps in evidence, if the Court please.

Judge Hand: They are admitted.

(Marked Defendant RKO Exhibit 4 in evidence.)

Q. Mr. Rathvon, are you familiar with the policies of RKO with reference to the distribution of features and short

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productions which are produced by organizations which do not have their own distribution facilities? A. I am.

Q. Will you please state to the Court RKO's policy in this respect and indicate the extent to which this policy has been effectuated. A. Our policy has been to distribute for producers who have no distribution outlets of their own a very large number of the releases which we put out. For a good many years RKO itself has not produced the number of features which its distribution organization can well handle, and it has been our policy for many years to supplement our own production, our own pictures, with pictures of independent producers.

Mr. Leisure: I ask to have marked for identification a table.

(Marked Defendant RKO's Exhibit 5 for identification.)

Q. Will you just explain the table, Mr. Rathvon, please.

A. This table shows over a number of seasons, total of nine seasons, the relative importance of the—in number of features (2262)

and in rentals received—product handled for so-called independent or outside producers. Thus, in the season 1935-36 RKO released 43 pictures, two of which were from these outside, or, here called, non-integrated producers. The income from those two pictures represented 4.4 per cent of the total product distributed by RKO. That season's product, the whole thing, showed gross rentals of \$14,598,000, and on those two pictures from outsiders, \$662,618, or 4.3 per cent of the total revenue received from those pictures. Then, as you go on, from season to season, it shows in most seasons an increased number of independent pictures handled by RKO and an increasing amount of the total film rentals received being applicable to the product of these outside producers.

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Q. Mr. Rathvon, in the fourth column you said that it was the total. You mean the total of RKO, don't you? A. Total from the rentals from the whole product.

Mr. Leisure: I offer the table in evidence.

The Witness: Those two dollar figures represent the division between RKO's own pictures and the outside pictures, the two dollar columns.

Mr. Leisure: Has that been received, your Honor?

Judge Hand: Yes.

Mr. Leisure: Thank you.

(2263)

(Defendant RKO's Exhibit 5 for identification received in evidence.)

Q. At the present time, Mr. Rathvon, are you distributing independent product? A. Yes, sir, at the present time we are distributing perhaps a little more product than we did in the 1943-44 season.

Mr. Leisure. I would like to have another chart marked, if I may.

(Marked Defendant RKO's Exhibit 6 for identification.)

Q. Will you describe this chart. A. This happens to be not a chart that was prepared for the purpose of this trial. It is a sample, in fact, it is the actual chart I used for my own purposes in watching monthly the division of the total revenues between the pictures we distributed for independents and our own pictures. And the whiter part of the chart represents the revenue in each month, that is, our own productions, and the upper part represents the productions of independents. This is really not a running chart; it could be shown better in columns than in this way, but each of the white cross lines is the end of a month. For instance, take

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the very first line, January, 1944. In that month, of the rentals we received, 66 per cent came from RKO's own productions and 34 per cent from two productions of independent producers.

Now, the same goes, at varying rates; some months the (2264)

productions of independent producers account for almost half of the total rentals received—in fact, there is one month, April, 1945, when rentals collected in that month were in greater quantity for independent producers than for our own pictures.

Mr. Leisure: I offer the table in evidence. May that be received?

Judge Hand: Yes.

(Defendant RKO's Exhibit 6 for identification received in evidence.)

Q. Mr. Rathvon, will you tell us whether or not during the past ten years RKO could have operated as a distributing company using only its own product? A. It could not have operated successfully.

Q. Has this distribution of independent product been affected by the fact that RKO has theatre outlets of its own?

A. In the competition to secure the desirable independent product for distribution, I think it has counted very substantially.

Q. I think you said that RKO distributed Walt Disney's pictures? A. It does.

Q. Would you just explain that, please? A. We have distributed the short product made by the Walt Disney Company for a great many years. They had previously been distributed by United Artists. When a given contract had (2265)

run out there, we got in competition and bid against United

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Artists with Disney and finally persuaded him to give us his pictures, and we have distributed the shorts product ever since. We made also, at that initial time, a contract to distribute Snow White and the Seven Dwarfs. Since then Disney has made a number of feature length pictures, and in each case we have had a separate negotiation for it. We have been successful in all cases but one. One of their features they sold away from us to United Artists, but the next one, we won out, and we have distributed the Disney features ever since.

Q. What about Goldwyn products? Do you distribute them? A. We have distributed Goldwyn productions for the past several years.

Q. How did that come about? A. There again, they had been distributed previously by United Artists, and there again we competed for that product and, by offering very attractive terms, were able to procure it, and it means approximately three important pictures a year added to our distribution.

Q. International Pictures, Inc., do you distribute that? A. International Pictures is a very important independent producing company that was formed quite recently; been operating only a little over a year, but it was formed by important and experienced producers, and they have delivered some very important product. They make from (2266)

somewhere, probably, from four to six pictures a year. I think to date we have distributed six pictures for them, and they have all been very important pictures. In that case we got the distribution contract with them at the time they organized, and I don't know how many companies competed for it. I know we had many meetings with them and negotiations, finally resulting in our getting the contract.

Q. As to the productions of Frank Capra? A. Frank Capra and two other important producers are in the process

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—they just formed a new independent unit and have not yet delivered a picture. They are just getting ready to get under way. They expect to have about three pictures a year, too, and we have negotiated with them and have made an arrangement to distribute eight pictures for them.

Q. In addition to these productions, Mr. Rathvon, does RKO-Radio Pictures distribute the releases of any other outside producers? A. Yes, several. Very often, or in almost every year, there will be some producer who makes a single picture and we will distribute for him. One producer, Mr. Sol Lesser, has a series of pictures known as Tarzan pictures. We have distributed those for several years. Then, Jesse Lasky now is making a picture, and that currently is a picture that is being made on our lot and we are going to distribute that one. Another picture of the same nature, that (2266a)

the producer is making only one picture, so far as we know, is a picture being made by a producer named Hakim, which, on our lot, is now being manufactured.

(2267)

Q. Have you lost the product of any outside producer?

A. We have, yes. For seven years we distributed March of Time, and at the end of seven years, in a competitive effort with Twentieth Century-Fox, we lost the distribution of March of Time to Twentieth Century-Fox, and they have distributed it ever since, and I mentioned a Disney film that we failed to get, which went to United Artists. That was Victory Through Air Power.

Q. In the distribution of its pictures does RKO license films to independent first and subsequent-run theatres as well as to affiliated theatres? A. It does.

Q. Have you checked the principal sources of revenue from the various groups of theatres paying film rentals to RKO for features released during the season 1943-44? A. I have.

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Q. What did that check reveal, please?

Mr. Leisure: I would like to mark at this time, if I may, another chart.

(Marked Defendant RKO's Exhibit 7 for identification.)

Q. (Continuing) Mr. Rathvon, this chart purports to be based on the answers to the Government's interrogatories, in which rentals from all theatres believed to be affiliated with any of the defendants either by direct ownership or through subsidiary corporations are lumped. Does that correctly reflect (2268)

the records of RKO as of April 26, 1945? A. As the sources of film rentals received 1943 and 1944.

Q. Will you just describe the chart, please? A. It shows graphically the source of film rentals; in other words, the blue part shows the amount of money and the percentage of the total for the period received from RKO; and similarly, by colors, are shown the source from the other defendants in this case; and the red shows the total of all the unaffiliated theatres. In the case of Paramount, of course it isn't from Paramount pictures, but from the companies in which Paramount has an interest, which we do business with, which is not all of the Paramount companies.

Mr. Leisure: I offer the chart in evidence.

Mr. Wright: We have no objection. I take it those are the same figures we put in Appendix A of our trial brief.

Mr. Leisure: That is correct, Mr. Wright.

(Defendant RKO's Exhibit 7 for identification received in evidence.)

Q. Mr. Rathvon, does RKO distribute enough features to occupy fully the playing time of the RKO theatres? A. It does not except in the case of perhaps two of our theatres.

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Q. Why is that? A. Because pictures, except in very (2269)

populous places, like our Palace theatre on Broadway, where you have long runs, the number of pictures we distribute in any one year will not fill the needs of the rest of our theatres.

Q. Could RKO profitably close its theatres when it had played all the RKO product? A. No, it would be very uneconomical to do it. In fact, in the past there have been times when RKO had theatres that had only its own product, when we did have to close them down for a period. Those theatres were always substantial losers when we had only the RKO product.

Q. In licensing films of other producers in RKO theatres, what policy does RKO follow? A. RKO tries to get the best pictures it can at the best rental, regardless of where they come from.

Q. In licensing those features, does RKO use product of other distributors that don't themselves have theatres? A. It does.

Mr. Leisure: I would like to have permission to mark for identification a table and chart.

(Chart marked RKO Exhibit 8 for identification; table marked RKO Exhibit 8-A for identification.)

Q. Will you describe the chart, please, Mr. Rathvon? A. This shows product exhibited in RKO theatres on the basis of number of billings, in our first-run and metropolitan (2270)

circuits. The data here were taken from our own records, the records of our booking corporation, and it shows the number of feature billings in those RKO theatres. RKO played 2402, 23.1 per cent of the total; the combination of the other defendants played 3000, or 29.6 per cent total;

Nathaniel Peter Rathvon—By Defendant—Prelim. Cross

and other sources than the defendant companies, 47.3 per cent.

Q. You mean the integrated defendants? A. The integrated defendants, 29.6, that is, the integrated defendants other than RKO itself.

Q. Yes.

Mr. Leisure: I offer the chart in evidence.

Mr. Wright: If the Court please, these figures appear to be different from those previously furnished. I would like to examine into it before it goes in.

Preliminary Cross Examination by Mr. Wright:

Q. This statement at the top here, first-run and metropolitan circuit run, that includes what? A. That includes New York.

Q. You mean all that you have on the chart here are the— A. The combination of—

Q. The feature billings in the New York City first-run theatres, and what other theatres? A. This is the billing in all our first-run theatres, in our New York metropolitan circuit.

(2271)

Q. Have you got a list of those theatres? A. I have.

Mr. Leisure: I gave you one of those.

Mr. Wright: May we have that, so we will know just what is included?

Q. Are those the theatres that are named on this chart that is marked RKO Exhibit 8-A? A. That is correct.

Q. So this does not purport to be an analysis of the use of features of others throughout the circuit, but only in the theatres that are named on the list, RKO 8-A, is that right?

A. Which is 90 plus per cent of our total circuit.

Nathaniel Peter Rathvon—By Defendant—Prelim. Cross

Q. When you say number of feature billings, that is substantially the equivalent of the number of engagements or number of runs that were played, is that right? A. I mean billings.

Q. Do you mean—— A. A billing results in a run.

Q. Do your percentages here refer to dollar revenue——

A. No.

Q. —or do they refer to the number of—— A. Showings.

Q. Showings? A. If you want to call it that.

Q. So your chart that you have here then indicates nothing as to the relative rental payments that were made on the billings, is that right? A. This particular chart does not show——

Q. This is purely nothing but the number of billings? (2272)

A. Billings.

Q. As a matter of fact, of course, when you get down there to Republic, Monogram and the others, the actual percentages of rental paid for those billings would be much smaller than the percentages there that you have got for the number of billings, would they not? A. Compared with what?

Q. I say, the percentage figure that you show, for example, from Monogram, of 7.9 per cent of the billings, if you were to give a figure which purported to show the percentage of total revenue of all these billings that was paid to Monogram, that would be a much smaller percentage than 7.9, isn't that right? A. It might not be as compared with Loew's, for example. If you were to ask me whether a single billing from Monogram gets a much smaller rental than a single billing from one of the integrated companies, I would say yes, but when the accumulation of billings becomes a great deabin number, I cannot say that the total of those—the numbers might not compare favorably with the lesser

Nathaniel Peter Rathvon—By Defendant—Prelim. Cross

number of billings that we have with some of the other companies. For example, Paramount had only 343 billings, Monogram had 817. I cannot say that—I would presume that we paid more to Paramount for 343 than to Monogram for the 817, but I would not presume we paid more to Paramount for the 343 than we paid Universal for 1718.

(2273)

Q. In any event, you have not attempted to make a comparison which would show the relative amounts of— A. What discharge—

Q. —money that were paid? A. Isn't shown in dollars.

Judge Hand: He has said that. This is the second or third time.

A. (Continuing) Shows you the playing time all our theatres were occupied with Monogram pictures, plus as many hours as some others.

Q. The number of billings is not necessarily a measure of playing time, is it? A. Doesn't necessarily measure the number of days of playing time.

Q. You may have one billing for— A. Six days, another for five.

Q. So it does not reflect the distribution of playing time either? A. It reflects the distribution of playing.

Mr. Leisure: I offer the chart, if you please.

Mr. Wright: I think, if the Court please, it is misleading in its present form there. It is objectionable on that ground.

Judge Goddard: What is that, Mr. Wright.

Mr. Wright: I think it is objectionable as misleading. It does not give a true picture of the distribution of playing time or film rental among the

(2274)

companies covered there.

Nathaniel Peter Rathvon—By Defendant—Direct

Mr. Leisure: We cannot give it all in one chart. We will cover it very quickly, I hope.

Judge Hand: All right.

(Defendant RKO's Exhibit 8 for identification received in evidence.)

By Mr. Leisure:

Q. Mr. Rathvon, from the figures you have just stated, I note that certain features distributed by Fox, Loew's, Paramount and Warner, are sometimes licensed for exhibition in RKO theatres? A. That is correct.

Q. In booking a picture distributed by Paramount, is there any understanding, express or implied, that RKO Radio Pictures will give any preference to a theatre affiliated with Paramount as against a competing unaffiliated theatre?

A. There is not.

Q. Is the same true with reference to features which RKO theatres license from Fox, Warner and Loew's? A. That is true.

Q. When RKO, as a distributor, licenses a film for exhibition in a theatre affiliated with Paramount, is there any understanding, either express or implied, that the Paramount distributing organization will give preference to theatres affiliated with RKO on Paramount releases? A. There is not. (2275)

Q. Is the same true of features licensed by RKO for exhibition in theatres affiliated with Fox, Loew's and Warner? A. That is true also.

Q. Mr. Rathvon, have you made any examination of the records of the RKO companies with particular reference to the charge made in the present case that RKO gives preference to the features released by other integrated companies, in consideration of an express or an implied agreement that those companies will give a reciprocal preference to RKO pictures? A. I have.

Nathaniel Peter Rathvon—By Defendant—Prelim. Cross

Mr. Leisure: I ask to have this chart and table marked for identification, please.

(Chart marked Defendant RKO's Exhibit 9 for identification and table marked RKO's Exhibit 9-A for identification.)

Q. Will you explain the chart? A. The chart shows graphically the data that is in the tabulation that goes along with it, and it is a comparison of the average per theatre rental received by RKO Radio Pictures, and as compared with the rentals paid by RKO theatres. It takes each of the companies separately. The tabulation itself shows the total dollars in each case of rentals received by RKO and the rentals paid by RKO, and the chart shows this on the basis of the average per theatre.

Mr. Leisure: I offer the chart and table in evidence.
(2276)

Mr. Wright: It is not at all clear to me from the witness's examination as to what this chart actually covers. I think I will ask him a question or two on it before it is received.

Preliminary Cross Examination by Mr. Wright:

Q. This average rentals received that you have in the first column there, that is in blue, has a figure, 43,020. How was that computed? A. That is the average rental received per theatre.

Q. You mean you took the total amount received from all of the RKO theatres and then divided it by the number of RKO theatres and got \$43,020? A. That is right.

Q. And that was without reference then to how many pictures were used or what runs they were used on, or any of those factors, is that right? A. Will you repeat that?

Q. (Question read.) A. The number of pictures used of course is important. The run is not important. It is average rental per theatre.

Nathaniel Peter Rathvon—By Defendant—Prelim. Cross

Q. And you used the rental per theatre— A. If you would use some other column than the first, where RKO has dealt with itself, it would be easier to explain.

Q. Let us take the Fox column then. That figure, \$4,335, I take it, was computed by taking the total rental that you received from 499 Fox theatres, and then dividing that figure by 499, is that right? A. That is correct.

(2277)

Q. And the same— A. For the other figure we took the amount that 93 RKO theatres paid, \$2,181,515, and found the \$23,455.

Q. That is confined to feature rentals, is that right, in each case? A. As distinguished from short subjects?

Q. Yes. A. Yes, this—

Q. Does this include shorts and newsreels? A. Shorts, I am sure, are not included in this chart.

Q. Feature rentals only? A. Yes.

Q. But no attempt was made to give weight to the particular number of features used by any theatre or the run in which they were played, is that right? A. No, it is on the basis of the total number of theatres in each company as against the 93 in RKO.

Mr. Wright: I submit the chart has no meaning in this form.

Mr. Leisure: We have offered it in evidence.

Judge Hand: I do not understand you.

Mr. Leisure: And the table with it.

Judge Hand: What?

Mr. Leisure: We would like to have the table, 8-A and the chart offered together, if the Court please.

Judge Hand: Well, I don't understand what meaning it has.

(2278)

Judge Goddard: Mr. Leisure, I do not understand what relation the green has to a number. What is the significance of it?

Colloquy

Mr. Leisure: Well, they go together, if the Court please. You will look at RKO, and you see the green and the red there, and then you look at Fox. I think I will let the witness answer that, if I may.

Judge Goddard: There does not seem to be much relation there.

Mr. Leisure: That is what we want to show, if the Court please, that there is no reciprocity here—

Judge Goddard: I am not talking about reciprocity. I mean the relation between the green and the red, the numbers.

The Witness: Shall I try to explain that, Judge Goddard?

Judge Goddard: Yes, I wish you would.

The Witness: I would like to take that Fox, for example—

Judge Hand: I should think this whole business is getting very complicated—the multitudinous seas incarnadine, making the green ones red. It is a mess. Why can't this thing be stated without such detail?

Mr. Proskauer: Will your Honor let me make a suggestion as to the way I read this chart? The ob-

(2279)

jective, I take it, is to show that there is no back-scratching in the sense that that term has been used.

Judge Hand: Yes?

Mr. Proskauer: Now, if you offered in evidence merely the amount of rentals paid as against the amount of rentals received, you would be met with the objection that they did not signify much because it was a varying number of theatres. So the chart, which I have seen for the first time, obviously breaks it down into a comparison of theatre by theatre, and takes into account the varying number of theatres. And having done that, it shows a wide discrepancy

Nathaniel Peter Rathvon—By Defendant—Direct

between what RKO got from us, for example, and what we got from RKO, theatre for theatre.

Judge Hand: Yes.

Judge Bright: Is that a correct statement of that, Mr. Rathvon?

The Witness: Yes.

Mr. Leisure: May I ask the witness just one question on that? I think it will clarify it for you.

Judge Hand: Yes.

By Mr. Leisure:

Q. Just take Fox alone, Mr. Rathvon, and just explain that without going through the other theatres? A. The total amount of money from Fox divided by the number of theatres that Fox had means that each of those theatres paid (2280)

RKO on the average \$4,335. The total amount of money that RKO paid Fox for the showings in its theatres, in its 93, averages out \$23,455 per theatre.

Q. So as Judge Goddard observed, there is not much relationship between those two, is there? A. Exactly.

Q. Mr. Rathvon, has there been or is there any agreement or understanding between any RKO company and any other defendant that RKO theatres will license the releases of such defendants for exhibition in RKO theatres on the condition, express or implied, that RKO features will be licensed for exhibition in theatres affiliated with such defendant? A. There is not.

Q. I have just one further question, Mr. Rathvon: In this case the Government seeks to have RKO divest itself of all of its theatres and to enjoin it from thereafter acquiring any theatre outlets. Based on your experience what effect would such action have upon the operations of RKO? A. Well, to cut us off completely from the ownership of theatres would weaken us very seriously. I have tried to show

Nathaniel Peter Rathvon—By Defendant—Cross

that RKO has been dependent for its very existence in the past on its theatre ownership and the assurance of steady revenue from those theatres. Now, RKO is stronger now, but in the six years out of receivership it has made money on its production distribution activity in only three years, the (2281)

current year, and the two preceding years; and I doubt if we are so fortified with earned assets or earnings accumulated over these three years of high taxes to withstand another period that we are bound to face some day when production will no longer be profitable. And to foreclose RKO from theatre ownership entirely would not benefit anybody and would impair our company very seriously.

Mr. Leisure: Are Exhibits 8-A, 9 and 9-A received?

Judge Hand: Yes, they are all admitted.

(Defendant RKO's Exhibits RKO-8-A, 9 and 9-A for identification received in evidence.)

Mr. Leisure: Are there any other questions?

Mr. Proskauer: I just want to ask one or two questions.

Cross Examination by Mr. Proskauer:

Q. Mr. Rathvon, you referred to the fact that you got your pictures into the Music Hall once or twice a year, or something of that sort. A. We have had one last year and one the year before.

Q. And you referred to the fact that it was important for you to make a showing in these first-run theatres, entirely apart from the immediate revenue. Now, when you sell to one of these very big first-run theatres, the de luxe theatres, that have stage shows and all that sort of thing; do you (2282)

usually get, irrespective of the question whether it is affiliated or independent, do you usually get as big a percentage con-

Nathaniel Peter Rathvon—By Defendant—Cross

tract as you sometimes get from subsequent-run theatres?

A. You speak now of a big theatre in New York City?

Q. Well, I will start with the Music Hall. A. A good average run in the Music Hall in New York would not give you an amount of money equal to the total of the subsequent-run rentals.

Q. I am not talking about the amount of money; and I am directing your attention to a question that Judge Bright asked here the other day, as to why it was that in some cases a subsequent-run theatre would contract to pay a percentage that might be a higher percentage than a prior-run theatre paid. That does happen at times, doesn't it? A. I presume it does, yes.

Q. Now, take the Music Hall. Do you remember what percentages you get from the Music Hall? A. Well, the Music Hall has a peculiar way of licensing. They have a set amount, and then you split above a fixed amount.

Q. Exactly. You start at 15 or 20 per cent, which is it?

A. I am not sure, but it is something of that kind.

Q. Well, it is a small percentage, like 15 or 20? A. The percentage from the Music Hall, in terms of percentage, could be termed less than of a subsequent-run that had a picture (2283)

ture on a straight percentage basis.

Q. Exactly. And the Music Hall has a big stage show?

A. That is correct.

Q. And it is an enormous theatre? A. That is correct.

Q. A very expensive theatre to operate? A. Yes.

Q. But your gross money return out of it, in view of all that, may be much more even if you start out with a smaller base percentage? A. That is so, sir.

Mr. Proskauer: That is all.

Mr. Leisure: Any other questions?

(No response.)

Mr. Leisure: Your witness, Mr. Wright.

Nathaniel Peter Rathvon—By Defendant—Cross

Cross Examination by Mr. Wright:

Q. This RKO Film Booking Corporation that you spoke of on your direct examination, which Mr. Mirish acts as the agent for— A. Is the manager of.

Q. —is the manager of—that corporation, I think you referred to it as booking the films for the RKO theatres. Actually it also buys and negotiates the licenses for those theatres, does it not? A. That is correct, yes.

Q. And that film buying activity is something that you have nothing directly to do with at all; is it? A. I have nothing to do with the direct operation of picture buying. I am familiar with what is done.

Q. In so far as others tell you; but I mean, you have no (2284)

firsthand experience in the actual booking and buying of films; isn't that correct? A. I am not a booker or a buyer.

Q. And the same is true with respect to experience in either selling or licensing films on the other end as a distributor, isn't that right? A. That is equally true, that I am not a film peddler; but it is equally true that I am not a projectionist in the theatre booth either.

Q. I am not referring to what you were; I am referring to what your experience had been. A. Well, in my past experience I have never been in any of those capacities.

Q. You have never sold films or bought films; is that correct? A. That's correct.

Mr. Wright: Will you mark these for identification, please?

(Marked Government's Exhibits 386 and 387 for identification.)

Q. Now, I hand you this agreement marked Government's Exhibit 386 for identification and ask you if you rec-

Nathaniel Peter Rathvon—By Defendant—Cross

ognize that as the agreement to which B. F. Keith is a party, relating to the Grand Rapids theatres which are operated by Butterfield Theatres Corporation? A. I have never seen this before, but I have no doubt that it is if you say it is.

Q. It was, I believe, produced by Mr. Seymour as (2285)

that agreement from the Paramount files. A. Well, it is dated the 24th of August 1933—I will read it if you like—

Mr. Leisure: No. We concede it is if you say it is, Mr. Wright.

Q. I just wondered, had you read that agreement before you testified here as to the relationship between RKO and Butterfield Theatres, Inc.? A. Is this agreement dating back to the vaudeville days when an agreement between Publix Theatres and—

Q. This is an agreement of 1933. A. —and B. F. Keith and Butterfield?

Q. Yes. A. I have not read it. I have had it described to me.

Q. I call your attention to this provision which is at page—

Mr. Leisure: Mr. Wright, may I ask, is that 1928 or 1933?

Judge Bright: 1933.

Mr. Wright: 1933.

Q. In this agreement at page 9, I call your attention to the provision which reads as follows:

“With respect to the booking and exhibition of feature motion pictures in the theatres, the MANAGER”——

I take it that refers to Butterfield——

Nathaniel Peter Rathvon—By Defendant—Cross

(2286)

"agrees to book and exhibit therein, during the term of this agreement, such number of motion pictures distributed by RKO Distributing Corporation (or any corporation taking over the business thereof) and subject to such terms and conditions as are specified in Article 20 of an agreement made September 24, 1926 between Walter S. Butterfield, Famous Players-Lasky Corporation, Balaban & Katz Corporation, Publix Theatres Corporation and B. F. Keith Corporation."

Mr. Proskauer: Did you say Warner?

Mr. Wright: What?

Mr. Proskauer: Did I hear the word Warner?

Mr. Wright: You did not.

Q. (Continuing). I will show you this agreement bearing that date to which those corporations are parties, which has been marked for identification as Exhibit 387— A. That is an agreement of December 24, 1926?

Q. Yes. A. That is the agreement I had in mind when I said I had not read it but I had it described to me. I was wrong when I said that about this particular agreement.

Q. Well, this agreement that I show you, you recognize that as the 25-year agreement that was made in 1926 and is referred to in that paragraph I just read?

Mr. Leisure: We concede that it is, Mr. Wright, (2287)

if you say it is. Let us save some time.

Q. You say this agreement which is identified as Government's Exhibit 387 had been described to you? A. It had been described to me when I asked the question how we ever happened to own this Butterfield stock, that it was the result of a vaudeville booking arrangement with the then

Nathaniel Peter Rathvon—By Defendant—Cross

owners of the theatres and Paramount-Publix. If there were other parties I did not know it at the time; and to me it is just an investment that I inherited, and what its history was in the past, I am afraid I am not very well qualified to testify on, because it has been nothing but an investment ever since I have had anything to do with RKO.

Q. And the relations between RKO and Butterfield as to management and film buying are set forth, are they not, more accurately in these two agreements rather than anything you testified to? A. No; what I testified to are what the conditions are now and have been for some time past in relation to it. I can testify from the time I became president of this company Butterfield has been nothing but an investment; we have done nothing about attempting to manage them or in any way have anything to do with their operation. To me it has meant nothing but an investment which I would like very much to sell if someone would offer the right price for it.

(2288)

Q. Now, I will call your attention to this paragraph 20 of the 1926 agreement marked for identification as Exhibit 387, which provides for the licensing of a certain number of films each year by a corporation, or released by a corporation designated here as P.D.C. or any corporation producing or distributing feature motion pictures substituted by Keith for said P.D.C. That, I take it, refers to the Producers Distributors Corporation which was at that time a distributor of the name of the distribution organization which was affiliated with RKO, isn't that right? A. No.

Q. Would you know what that did refer to? A. P.D.C.?

Q. Yes. A. That was a distributing organization which passed out of existence a long, long time ago.

Q. I understand. A. And to the best of my knowledge it was never owned by RKO, and as far as I know it was owned only by an individual named Jeremiah Milbank, but it is way

Nathaniel Peter Rathvon—By Defendant—Cross

back in history and I do not know a great deal about it.

Q. Do you know what was done under this agreement with reference to designating a substitute for this P.D.C. pursuant to the terms of this agreement identified as Exhibit 387? A. Did I understand you to say that B. F. Keith had that right to designate?

Q. It is so set forth in paragraph 20 of this agreement.

A. I must only answer on the assumption that if B. F. (2289)

Keith had that right, at some stage they may very well have nominated someone as a substitute for P.D.C.

Q. Well, that would be at the present time RKO Film Distributing Corporation, isn't that right, or RKO-Radio Pictures, Inc.? A. No such relationship exists today, I assure you.

Q. Well, do you know, what, if any— A. They may have designated it in the past, maybe for a time some distributing—maybe RKO Radio Pictures—I am testifying only to the time I have been associated—

Q. Just listen to the question. Can you tell what if any modifications have been made with respect to these two written agreements I am showing you here, 386 and 387 for identification, since they were executed? A. From the paragraphs you have shown me in this 1933 agreement, there obviously was a modification, and the paragraph you called my attention to indicated a continuation of the—I assume the provision you are talking about in that agreement for the length of this contract; and unless you point to me the term of that contract I would not be able to know how many years that is.

Q. Well, the contract will speak for itself as to the term.

A. May I refer again to the paragraph you pointed out to me? Is this it (indicating)?

(2290)

Q. Yes. What I want to find out from you is what if any modifications have been made subsequent to the execution of

Nathaniel Peter Rathvon—By Defendant—Cross

these agreements, if you know? A. This in itself appears to be a modification and extension.

Q. I understand. A. And it must have an expiration date, I assume, and I assume it expired. But what that expiration date is, I don't know.

Q. Well, this basic agreement here has an expiration date of 25 years from its execution. I take it you have no doubt that the basic agreement has not expired; is that right?

Mr. Proskauer: I object to that as a conclusion of law. Here are two papers in evidence——

Mr. Seymour: They are not in evidence.

Mr. Proskauer: — and he is continually examining this witness as to what the papers mean.

Judge Hand: Overruled.

A. This paragraph you pointed out to me seems to indicate that it carries forward into the provision of this contract the provision which is Article 20 of the earlier contract, which is the right to substitute, the right of substituting for P.D.C.

Q. And I call your attention to the fact that the earlier contract, marked for identification as Exhibit 387, says: (2291).

"The term of agreement shall be for a period of 25 years from and after January 2, 1927."

Now, may I ask you again, do you know what if any modifications in the terms of these two written agreements that are before you have been made since they were executed?

A. I don't know of any other contracts modifying that term. All I can say to you is, what is stated there is not being carried out today. Whether there is a contract to carry it out still in existence, I don't know.

Q. And you don't know whether the reason why it is not being carried out today is due to some further written modification or not, is that right? A. That is right.

Colloquy

Mr. Wright: We offer these two agreements in evidence.

Mr. Seymour: If your Honors please, as far as the first one is concerned, which is the agreement with respect to the Grand Rapids operating agreement, which is relatively short, I have no present objection to it. The other document is a long printed document, and I object to it as irrelevant.

Your Honors will recall how this arose. Mr. Beatty, called by me as a witness, testified both as to the operating agreement in Grand Rapids and with respect to the way Butterfield was actually operating. He was president of the company. While he was on the

(2292)

stand Mr. Wright asked to have the agreements, and we produced them, and we held him in New York until Mr. Wright excused him, saying he did not want to examine him. Now, I think at this stage to have that long agreement received in its entirety is an unnecessary burdening of the record. If there are individual parts offered not in contradiction to the witness, but for another purpose, we won't object. But here is a lengthy document, and if it is going to be received now, then I am put to the burden of bringing that gentleman back, or somebody else, and I think it is unnecessarily encumbering the record.

Mr. Wright: If the Court please, you recall that I told Mr. Seymour in open court at the time these were produced that I proposed to offer them in evidence, and that if he desired any explanation of them from Mr. Beatty, he had better keep him here; but I, however, did not desire to cross-examine him on it.

Now, these agreements set forth the manner in which the Paramount, RKO and Butterfield interests were originally consolidated in that Michigan area,

Colloquy

and is, in my view, far better evidence of what the parties had in mind at that time and what they did than any possible oral testimony that could be elicited from either Mr. Beatty or Mr. Rathvon.

Judge Hand: Overruled.

(2293)

(Government's Exhibits 386 and 387 for identification received in evidence.)

Mr. Wright: I think that is all.

Mr. Leisure: That is all, Mr. Rathvon.

Mr. Leisure: This morning Mr. Davis was good enough to let me go ahead of him when he had some work prepared, and with the Court's permission I am going to let him proceed now with some charts that he has.

Judge Hand: Have you got anything more?

Mr. Leisure: Yes, sir.

Judge Hand: How much?

Mr. Leisure: I have another witness who will take almost as long as this witness. Then I will be through, except for some charts that I want to put in.

Mr. Davis: If the Court please, some time last week I introduced Exhibit L-7, which was a statement of domestic feature film license fees billed by Loew's to all exhibitors during the fiscal years 1936 to 1944, both inclusive. I now wish to withdraw the exhibit which was then admitted in evidence and substitute another exhibit of the same sort. I have found errors in the exhibit after it was filed. I withdraw the present exhibit L-7 and substitute this. The errors were in computation. There is no change in the form.

(2294)

(Statement referred to marked Loew's Exhibit L-7 in substitution for statement previously marked Loew's Exhibit L-7.)

Mr. Davis: I offer tabulation showing the feature film license fees paid by Loew's Metropolitan Theatres for the fiscal years ending August 31, 1931 to 1944.

Judge Hand: Have you examined it, Mr. Wright?

Mr. Wright: I am just looking at it now.

Judge Hand: Mark it for identification.

(Marked Defendant Loew's Exhibit L-8 for identification.)

Mr. Davis: Has that been admitted?

Judge Hand: That will be admitted. Received.

(Defendant Loew's Exhibit L-8 for identification received in evidence.)

Mr. Davis: I offer in evidence a tabulation showing the feature film license fees paid by all Loew theatres in the United States (including Buffalo theatres) for the fiscal years ending August 31, 1931 to 1944, showing what percentage of the total was paid to the defendants at the bar and to miscellaneous producers.

Judge Hand: Mark it for identification.

(Marked Defendant Loew's Exhibit L-9 for identification.)

(2295) Mr. Davis: I now offer a table showing in contrast total feature film license fees received by Loew's as a

distributor from all domestic exhibitors, 1937 to 1944, and the total feature film license fees paid by Loew's as an exhibitor to all domestic producers in the same period.

Colloquy

I did this in order to show that there is no correlation between the receipts and the payments; and I might say also to prove that it is more blessed to receive than to give.

(Marked Defendant Loew's Exhibit L-10 for identification.)

Mr. Davis: At page 1117 of the printed record Mr. Caskey introduced a chart showing the simultaneous first-run release of the film to which it then related. Your Honors suggested that a similar table from the defendants might be helpful for comparison.

I offer a chart showing the first-run release of the film *As Thousands Cheer* beginning September 13, 1943. If your Honors will have those before you, I want you to note one striking phenomenon about it.

(Marked Defendant Loew's Exhibit L-11 for identification.)

Mr. Davis: I am offering it in evidence.

Your Honors will notice, with this chart before you, that the exhibition at New York began on September 13, 1943, and continued until November 21, 1943. That was a preliminary release showing at the
(2296)

Astor Theatre. General release came on December 23, 1943. And then you will notice a series of releases at or about the New Year, which indicates that those contemporaneous releases were shooting at the holiday trade. From then on it goes down, as shown by the chart.

I offer in evidence a chart showing the total operating theatres in the United States compared with Loew's total operated theatres from the years January 1, 1932 to January 1, 1945. I offer this chart to show the contrast between the acquisition of theatres

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operated by Loew's and the growth of the theatres in the United States during that same period.

Mr. Wright: If the Court please, the use of these Film Daily Year Book figures for this purpose I think is particularly misleading. They do not indicate or even purport to indicate, as I understand it, theatre acquisitions by anybody. All that you have reflected is, I believe, only the reopening of certain theatres which were formerly closed, which, of course, is a natural phenomena when there is an increase in business prosperity generally. I do not see how these data that are reflected in the chart here are a proper basis for proving what Mr. Davis says they prove.

Judge Hand: Overruled. That is a matter of (2297) argument later.

(Marked Defendant Loew's Exhibit L-12.)

Mr. Davis: When the witness Rodgers was on the stand I offered in evidence a list of the first-run theatres in the 92 critical towns.

Judge Hand: Just a minute.

Mr. Davis: In examining the witness Rodgers about the first-run theatres, Loew's and others, in the 92 critical towns, I offered a list of the first-run theatres in those towns, with the statement of their respective seating capacities. It was agreed, as I understood it, or, if not agreed it was tacitly understood, that that list should be checked, and it was handed to Mr. Wright for that purpose, and I have had it checked myself. I wish to offer it with certain corrections. In the testimony the theatre Bijou at Knoxville was erroneously stated to be a first-run theatre. It is not. The Marlo at Salt Lake City was erroneously stated to be a first-run theatre. It is not. The Florida Theatre at Tampa was erroneously stated to

Colloquy

be a first-run theatre. It is not. The Capitol Theatre at Rochester we understand not to be a first-run theatre. The Downtown Theatre in Detroit was listed on that list as owned and operated by Howard Hughes. We now understand it to be operated by the Downtown Amusement Company. The Palace and Gary (2298)

theatres at Gary, Indiana, were listed on the first list as affiliated. That is in error, as the names of the operators are Young and Boucher. The seating capacity of these theatres we have had checked by our district managers in the districts where the theatres are located. We now believe this seating list to be accurate. I offer that list.

Mr. Wright: We have no objection providing we can find out now, which we could not find out when Mr. Rodgers was on the stand, what definition of first-run theatre was used in making these classifications. That is, what the term "first-run theatre" means as applied to these theatres on this list. That is something we ought to know.

Mr. Davis: I think you will find all that in Mr. Rodgers' testimony. He identified these theatres and identified those which Loew's licensed to him.

Mr. Wright: If the Court will recall, at the time Mr. Rodgers testified we tried to find out what the basis of the selection was and we could not do it. As to whether or not he took as a first-run theatre those which had no regular first-run of any major product, or whether he did not. Now, I do not know as to this (2299)

list. Some of these theatres, as far as I know, are not theatres which are first-run theatres according to our definition. That is, one which has a regular first-run of some major product. Now, I do not ask that he use our definition necessarily, but I just want to know

Colloquy

what definition was used in compiling the list, and what the term "first-run theatre" as it is used in the list means.

Mr. Davis: If there is one phrase in this case which up to this time seems to have not occasioned any dispute at all, it is what is first-run and what is subsequent-run. It did not occur to me that there is any room for dispute in the definition about that. And the witness took that as the list of the first-run theatres in these critical towns. I offer it.

Judge Hand: The objection is overruled. Received.

(Marked defendant Loew's Exhibit L-13.)

(2300)

Mr. Davis: At page 566 of the record the statement was made that in the 416 cities with more than 25,000 population As Thousands Cheer showed in 3631 theatres. The reports on the admission prices were available in 3237, and there are 346 cases where the minimum admission price was exceeded by the licensed theatre. Mr. Wright asked for a breakdown between first-run theatres and subsequent-run theatres, independent and affiliates, as to that increased price. I offer such a tabulation which shows that the first-run theatres which exceeded the minimum admission numbered 127; that the second and third and sub-run theatres exceeded the admission price—219 of them.

Judge Hand: Received.

(Marked Defendant Loew's Exhibit L-14 in evidence.)

Mr. Davis: Now, I hesitate to offer maps of New York after the splendid map which RKO has offered.

Judge Hand: I feared those blueprints when I saw them down there.

Colloquy

Mr. Davis: These have but one possible merit over those which have been offered by Mr. Leisure, and that is they are a little more compact and transportable. I offer a map of each borough of the City of New York showing the location of the Loew theatre and the location of all others. It is to demonstrate the fact that
(2301)

whatever else the citizens of New York may suffer from, they are not suffering from a lack of moving picture houses.

(Marked Defendant Loew's Exhibit L-15.)

Mr. Davis: I offer as an annex to those maps an index of the theatres owned by circuits other than Loew's in Greater New York, Long Island and New Jersey, with the numbers of the theatres.

(Marked Defendant Loew's Exhibit L-15A.)

Mr. Davis: Do your Honors wish to continue?

Judge Hand: No. Have you more of this documentary evidence?

Mr. Davis: I have one or two documents; and then I have a stipulation which I will want to offer.

Judge Hand: The clerk says that L-9, L-10 and L-11 were marked for identification only.

Mr. Davis: Everything that I have tendered I have offered in evidence.

Judge Hand: They are received in evidence.

(Defendant Loew's Exhibits L-9, L-10 and L-11 for identification received in evidence.)

Judge Hand: Now, what more is there if you can state it, before the defendants rest?

Mr. Frohlich: I have just one tabulation, your Honor, which will take just a few minutes.

Colloquy

Judge Hand: All right. Now, Mr. Leisure has a
(2302) witness?

Mr. Leisure: That is right, and then a witness with some exhibits, which will take, I think, a full day.

Judge Hand: You have two witnesses?

Mr. Leisure: One factual witness and one who will identify certain exhibits.

Judge Hand: Any other witnesses?

Mr. Seymour: I expect to have one or possibly two witnesses, relatively short; but there will be a lot of documentary stuff.

Judge Hand: You will have a lot of documentary matter?

Mr. Seymour: There will be some of this stuff. I have not any maps but I have everything else.

Mr. Proskauer: For Warners, your Honor, we are going to have a very small number of very clear charts. We are going to remember that it is more blessed to receive than to give. We shall also have a stipulation regarding one witness's testimony, and I think that is probably all excepting that we are all jointly thinking of offering some general tabulated evidence about the arbitration awards. We are trying to see if we can get them into some kind of tabular form. I am not sure whether we shall succeed or not, but I think that is about all we have to offer, and I suppose I could get through in an hour, assuming,

(2302a)

as I have every reason to believe, that Mr. Wright and I are going to agree.

(Discussion off the record.)

Judge Hand: All right, we shall adjourn until Thursday at 10.30.

(Adjourned to Thursday, November 8, 1945, at 10.30 o'clock a.m.)

Colloquy

(2303)

New York, November 8, 1945;
10.30 o'clock a. m.

Trial resumed.

Mr. Raftery: Mr. Wright has asked for the production of documents in a letter; and there is Universal's contribution—

Mr. Seymour: I can't hear you, Mr. Raftery.

Mr. Raftery: Mr. Wright has asked us to produce a group of franchises and other documents from Universal; and I am delivering them with this admonition. These are current contracts in daily use. The Government is free to photostat them or do anything they want, but they have got to give them back.

And here is United Artists' contribution. Same conditions.

Mr. Frohlich: Mr. Wright has asked me to produce the franchises of Columbia Pictures Corporation. While the original franchises are scattered all over the country, we have a franchise book from 1935 down to the present; and I have compiled a list of all of the Columbia franchises both with independents and affiliates. I should like to offer that in evidence. I have given a copy to Mr. Wright. They go from 1936-37

(2304)

down to the present time, and some of them run as far as 1942, 1945, 1946 and 1947. There is no 10-year franchise; there is no 5-year franchise. There are two 4-year franchises to independents, and the rest are 2 and 3-year franchises.

Judge Hand: I do not see why they did not get these things before and put them in by stipulation. You do not want all these papers around.

Colloquy

Mr. Wright: He was offering this, if the Court please, as his exhibit.

Mr. Frohlich: Mr. Wright asked me for them, and I have produced them; and I would rather have them in the record than just informally handing them over to him.

Mr. Wright: What he is doing is making an offer in evidence of material that he furnished us at our request. We have no objection to its going in, but it is not at our insistence that this is being made a part of the record.

Mr. Frohlich: It is my responsibility, your Honors. I want to complete my record.

Judge Hand: Then you have nothing to complain of, being the one encumbering the record.

Mr. Frohlich: I am the guilty party; but I think I need it for my record.

(2805) Judge Hand: Maybe you do. Then do not lament over his building up the record.

Mr. Raftery: I will take mine back if he does not want them.

(Marked Defendant Columbia's Exhibit C-9).

Mr. Frohlich: When Mr. Montague was on the stand, the Court will recall that he testified in certain cities he sold away from affiliates to independents, and Mr. Wright asked for the dates. Well, I have obtained these dates. I have a short list here, which is one page. I should like to offer that in evidence. I will have a copy in a minute.

Mr. Seymour: May I see it?

Mr. Frohlich: Yes, I will give you a copy of it.

(Marked Defendant Columbia's Exhibit C-10).

Mr. Frohlich: Now, in answer to one of our interrogatories we gave the Government the gross income

Robert Mochrie—By Defendant—Direct

from production and distribution of Columbia, and the net profits from 1935 down to 1938. And I want to supplement that with a brief statement of the gross income and the net profits down to 1944.

(Marked Defendant Columbia's Exhibit C-11).

Mr. Frohlich: Now, here I am offering in evidence a list of eight or ten independent circuits and the income which was derived by Columbia Pictures in 1943-1944 from those circuits.

(2306)

(Marked Defendant Columbia's Exhibit C-12.)

Mr. Frohlich: And at Mr. Wright's request, he has asked me to give him a detailed statement of the moneys received by Columbia from Paramount in 1943-44 which is one page and a half. I have compiled that. That represents a list of particular affiliates and the rentals received.

Mr. Seymour: May I see it, Mr. Frohlich?

Mr. Frohlich: Yes, sure.

(Marked Defendant Columbia's Exhibit C-13.)

Mr. Frohlich: I have no further offer.

Mr. Leisure: May we proceed now, your Honor?

Judge Hand: Yes.

ROBERT MOCHRIE, called as a witness on behalf of the RKO defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Leisure:

Q. Your name is Robert Mochrie? A. Yes.

Q. And you live in Manhattan? A. Yes.

Robert Mochrie—By Defendant—Direct

Q. Are you associated with RKO Radio Pictures, Inc.?

A. Yes, I am.

Q. What is your position with that company? A. I am the general sales manager of RKO Radio Pictures, Inc.

Q. How long have you occupied this position? A. Since the summer of 1942.

(2307)

Q. Will you please state your general duties in this capacity, please? A. Yes. As general sales manager I am responsible for the sales and distribution of RKO pictures in the United States and Canada and of independently produced pictures in the United States and Canada.

Q. Distributing RKO pictures? A. Yes, sir.

Q. Will you please state your experience in the motion picture business, Mr. Mochrie? A. I started as a salesman in the Cleveland territory in 1925; and in 1926 became Albany branch manager for the same company, Producers Distributing Corporation; and in 1927, Pittsburgh branch manager; that company was merged into Pathe and I went for them to Philadelphia as branch manager in 1928; later they were bought by RKO and I remained as branch manager in Philadelphia for RKO-Pathe until 1932, at which time I became branch manager for Warner Bros.; and in 1934 I became assistant general sales manager for Warner Bros.; in 1937 I became southern district manager for United Artists; and in 1939 southern district manager for the present company, RKO, having authority over the southern branches of Oklahoma City, Dallas, Memphis, New Orleans, Atlanta and Charlotte; in 1940 I became eastern and southern division sales manager for the same company; and in 1942, general sales manager, which position I now occupy.

(2308)

Q. Was it in 1931 that RKO bought Pathe, did you say?

A. Yes, sir.

Robert Mochrie—By Defendant—Direct

Q. Would you just outline briefly the distribution department of RKO Radio Pictures, please? A. Yes. I have assisting me in the work two division managers, one in charge of the West and the other in charge of the East and South. Each of these men has under him four or five district managers out in the field, each district manager having two to four branches under his jurisdiction. There are 32 branches in all in this country and six in Canada. Now, each branch is operated by a branch manager and he has under him an office manager, handling the clerical work, who has a group of salesmen, who has a group of bookers, a cashier, and then there are, in addition, film inspectors and film shippers. And there are also, usually at the rate of one man per branch attached to these branches, field exploitation and publicity men and they are under the immediate jurisdiction of a director of field exploitation, Terry Turner. There are, as well, traveling auditors; and in the home office there are various service departments, mechanically serving the branches, and that is under my jurisdiction.

Q. Can you tell us approximately what the annual cost of operating the RKO distribution system is? A. It is somewhat in excess of seven million dollars, domestic distribution. (2309)

Q. Without taking time to go into it, Mr. Mochrie, at this time, are the mechanics of RKO distribution generally the same as has already been described by representatives of other companies here? A. Yes, sir, they are.

Q. Do you participate in planning the production program of RKO Radio Pictures? A. I do. The production is entirely headed up by Mr. Charles Koerner, who operates the studios and is responsible for the production of the pictures. From time to time Mr. Koerner confers with people in the East and we are able to furnish him at times with information in respect to star values, and type of story values, things of that nature, which we have learned from our work with the exhibitors who in turn are in immediate touch with the public.

Robert Mochrie—By Defendant—Direct

Q. Mr. Rathvon, the president of your company, testified here Monday that in the 1943-44 season RKO distributed 32 of its own pictures and distributed six pictures produced by independent producers. Can you tell us how these six independently-produced pictures compared from the standpoint of popularity and revenue with the other pictures which RKO distributed in that season? A. Yes, I can. The average that season of all our pictures played was some 8000 engagements per picture. The average of the independent (2310)

independently-produced pictures that season was some 10,000 engagements per picture. The engagement per picture is a mark of the volume of distribution obtained. In money that year, we grossed, in this country, in excess of a million dollars on 13 pictures. Of those 13 pictures, four were independently produced.

Q. You mean a million dollars each on the pictures? A. A million dollars each, of course.

The highest-grossing picture of the season was independently produced. It was Mr. Goldwyn's "Up In Arms", which grossed approximately two and three-quarter million dollars. The second highest-grossing picture that season was also independently produced, "Lady Takes a Chance", which grossed just a few dollars short of two million dollars. That is domestic gross.

Q. How many outside produced pictures did RKO distribute in the 1944-45 season? A. That season we distributed eight.

Q. How many pictures of its own did RKO distribute in that season? A. 22.

Q. Will you tell us how the eight pictures which you have just referred to compared with the other pictures distributed by RKO? A. Yes. There again the average of the eight pictures played two more engagements per picture than the average of our own 22. And in money, we had, that

Robert Mochrie—By Defendant—Direct

season, 14 pictures each of which grossed in excess of a (2311)

million dollars and six of which were independently produced. Also, the highest-grossing picture for the 1944-45 season was Princess and the Pirate, and the next highest was Casanova Brown. Casanova Brown was produced by International Pictures.

Q. Who produced Princess and the Pirate? A. Again Mr. Goldwyn—Sam Goldwyn.

Q. What has been the policy of RKO with reference to its willingness to distribute outside produced pictures? A. Why, we are very willing and, in fact, desirous of distributing independently-produced pictures. The criterion as to whether or not we will take on a picture, subject to being able to negotiate terms for the distribution of the picture, is the quality of the picture. If it is in our opinion desirable, with prospects of excellent grossing in the theatres, we are interested; if in our opinion it is not desirable, we are not interested.

Q. In this case the Government charges that RKO and the other distributor-defendants combined and conspired to monopolize the distribution of motion pictures and to exclude from that business independently-produced pictures. Has your company to your knowledge ever taken any such action? A. No, sir.

Q. It has no such understandings or agreements? A. (2312)

None whatever.

Q. Have you ever discussed with any representative of any distributor-defendant whether RKO should or should not distribute a picture produced by an independent producer? A. No, sir, I have not.

Q. If in the 1943-44 season you had had no independently-produced pictures to distribute, would that have affected your competitive position? A. Yes, it surely would have.

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Q. Would you just tell the Court how? A. Yes. In selling my pictures, I am competing, and did compete that season, with some companies who have a pretty large number of top quality A pictures. In obtaining the six pictures we did that year, of independent production, we materially added to the number of A quality pictures that our own studios produced, which, in an over-all sense, enabled us to contact, in our sales work, the exhibitors on a much more competitive basis as an important company, the source of quality pictures.

(2313)

By Judge Bright:

Q. On what is your compensation based in the distribution of pictures from other producers?

The Witness: Will you repeat that, sir?

Mr. Leisure: Will you please read it?

(Question read.)

A. The compensation is based upon the gross rentals we obtain from the theatres—that is, the gross business we do.

By Mr. Leisure:

Q. And you get a percentage, Mr. Mochrie? A. Yes, sir, we do. The percentage varies in accordance with the particular deal for the particular picture. There are all sorts of various arrangements, but it is based—it is a percentage in one way or another of the total business we get for that picture; the total money we get for that picture.

By Judge Hand:

Q. Do you say that is true whether the licensee is an affiliate or an independent? A. Well, the money that we get for the picture comes from all the theatres to whom we sell that picture, some of which theatres may be affiliated

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and some of which may be independent; but it is the total money that we get from the picture from all sources.

By Mr. Leisure:

Q. And you get a percentage whether they are affiliated (2314)

or not? A. Yes, of course. We get percentage on the total money. There is no distinction where the money comes from.

Mr. Leisure: That was Judge Hand's question, as I understand it.

The Witness: Yes.

Q. Now, does RKO offer the features which it produces in blocks of five? A. Would you mind repeating that?

Q. Does RKO offer the features which it produces in blocks of five? A. Yes, we do.

Q. Do you include pictures produced by outside producers in those blocks? A. Sometimes, yes, and other pictures are sold individually and separately.

Q. Why, Mr. Mochrie? A. It depends upon the distribution contract that we have with the independent producer. Some independent producers have a contract with us specifying that their pictures shall be distributed individually, sold individually, and others do not.

Q. Is RKO required to offer its own pictures in blocks of five? A. It was required under the consent decree; and when that provision of the consent decree no longer became operative, RKO continued to offer in blocks of five.

Q. Now, when RKO licenses its features in a block of five to a given theatre, are several films licensed simultaneously (2315)

or is each licensed separately? A. Well, the entire five may be licensed simultaneously, but each of the pictures is negotiated for separately. The negotiations take place

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for each picture, although at one time the license may be made for the five pictures, or the application for license may be made.

Q. And how do you select the features to be included in such a block of five? A. Well, that is dependent first of all on the pictures, on what pictures are available from our studios that the studios have completed producing and have delivered us positive prints of; and then within that limitation we try to put together a balanced block; that is, balanced from the point of view of different stars, different types of pictures, a musical or a drama, and also different value pictures, balancing a high-cost production picture with a low-cost production picture, which, in turn, makes a well-rounded group to present to the exhibitor trade, with pictures of all sorts of use and all sorts of possibilities, for deluxe theatres and for the reverse.

Q. Now, when you have made up one of these blocks of five, is it your policy to insist that the exhibitor buy the whole block? A. Well, as a seller I make every possible effort to sell each exhibitor the entire block. I am very frequently unsuccessful in that, so that if the exhibitor for one (2216)

reason or another will not buy five, I sell four; and if he won't buy four, I will sell three; and if he won't buy three, I will sell two.

Q. Could you illustrate that, Mr. Mochrie? A. Well, you can illustrate that by the results of the distribution of a picture. The first block in the 1943-44 season contained five pictures: Lady Takes a Chance, Fallen Sparrow, Adventures of a Rookie, So This Is Washington, and The Seventh Victim. Now, the best grossing picture of that group was Lady Takes a Chance and that picture played to 14,000 engagements in this country. The reverse of that is The Seventh Victim, the poorest grossing picture of the group, which played to only 6,250 engagements in this country; that is

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less than half; and an intermediate picture, *So This Is Washington*, played 8500 engagements. That is, on the best picture we wrote many more contracts than we did on the poorest picture.

Q. Was that block typical of the 1943-44 releases as a whole? A. Yes.

By Judge Goddard:

Q. From your testimony it would appear you tried to sell a block of five and no more than five; but if the exhibitor won't take five you will sell him a lesser number, is that right? A. I do the best I can, sir.

Q. You do sell a lesser number? A. Yes, sir. That is (2317):

evidenced by the fact that I have endeavored to sell the five pictures to all the theatres that I can. In the case of the best picture I was successful in selling 14,000 theatres. In the case of the poorest of that block I was successful in selling only 6250 theatres. So there were many, many theatres that I did not sell that poor picture to.

A. But you do sell in less than blocks of five? A. Yes, I do, indeed. I sell as few sometimes as one of the five.

By Mr. Leisure:

Q. And you do not refuse—if I may supplement Judge Goddard's questions—you do not refuse to sell a theatre if it does not take the whole block of five? A. No, I do not.

Q. Now, does RKO trade-show its features making up a block before they are licensed? A. Yes.

Q. Will you tell us about RKO trade-showing, please? A. Yes. After the block is put together of the five pictures, we then arrange that each of the five pictures be screened in each of the exchange cities of the country, usually in a screening room in the exchange city; and the five pictures

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usually are screened on two or three successive days. We advertise the place of the screening, the time of the screening and the date of the screening for each picture in the trade (2318)

journals prior to the event.

By Judge Goddard:

Q. One other question I should like to ask you: In selling to independents or selling to affiliates, do you make any distinction between them whether you will insist on a block of five or not? A. None whatsoever, sir.

By Mr. Leisure:

Q. Mr. Mochrie, have you found trade showing beneficial to you as a distributor? A. Yes, I have.

Q. Will you explain, please. A. Yes. Up'untill the time I have trade-screened a block of five I do not have a contract on my books, which means that I have no contracts at the time my pictures are ready for showing to the exhibitors, and for exhibition in their theatres; that is, there are prints delivered in all the exchanges of the country, which means I start from zero, which, in turn, means the burden is placed where I think the burden should be. It is placed on the back of the producer of the picture. He knows that I have no contracts for his picture until such a time as that picture is shown the exhibitors of the country. I start from zero. And if he has made me a very fine picture, it means I will get very fine terms and very wide distribution; and if he has produced a poor picture, it means I will get poor terms and poor distribution; and it puts the burden on him to give me (2319)

a quality piece of merchandise.

Q. Has RKO made any franchise agreements with any theatres since 1940? A. No.

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Q. Does RKO-Radio Pictures give any preference to RKO theatres for first-run of its features? A. Yes, sir, we do. We endeavor to place our pictures with RKO first-run theatres.

Q. And would you explain that, please? Why do you do that? A. Well, first of all, where there are first-run RKO theatres, those theatres exhibit the picture on such an excellent basis, and the theatres in themselves, in my opinion, are of such a nature that I receive the best possible immediate rental for the actual showing of the picture in that theatre. That is the first reason, although perhaps not the most important.

Secondly, I am able to place our pictures in RKO first-run theatres nearly as rapidly as I wish and as frequently as I wish, which insures an even flow of product moving through these large cities of the country. Through the theatres, and becoming available to the theatres of that territory in which that large city is located, both subsequent-runs and general towns around that city. That is very important, because that means I am assured of a constant flow of pictures to that territory, and so, a constant income of revenue. (2320)

Now, the other reason, which is perhaps even more important, is the great assistance I get from those theatres in the exploitation and publicity of my pictures. You see, at times we have not been able to compete as well as we would like to in obvious star value names in our pictures with other companies; and so we have deliberately practiced as a distributor to the very best of our ability the use of exploitation and publicity to make up for the shortage, at times, of star names; which means that in my theatres scattered in large cities across the country I have an exhibitor who will fully cooperate with me and give great assistance in that exploitation.

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(2321)

I can give you a specific example right now: we recently produced a picture called *Spanish Main*, at a very high cost. The negative cost is in excess of two million dollars. Now that presented a task to get back moneys that would at least break even and perhaps return some profit to the company. So we planned on an elaborate and complicated magazine, comic sheet and national publicity campaign, and we timed that to reach a peak in early October, and then we picked October 12th, inasmuch as that would include a holiday, Columbus Day, as the time for releasing that picture in our theatres. We did that ourselves, the distributors, and asked those theatres to cooperate with us, which they did. So that *Spanish Main* blazed across the country in many of the great cities of the country on October 12th, and it did a very fine business indeed. It did such an excellent business that the entire trade, the other affiliated circuits, the independent circuits, the small independents, became aware that *Spanish Main* was an extremely successful box office picture. Now that will make my task immeasurably easier in getting high terms for the picture and in selling it quickly and widely and getting the best playing time from the theatres to whom I am selling.

Q. Any other example? A. I beg pardon?

Q. Any other example? A. Yes, and I hope it will come out as well or perhaps better. We have an important picture (2322)

coming up called *The Bells of St. Mary's*, with two important stars in the picture. Now that picture has been licensed to the Radio City Music Hall here in New York, and it will open in the middle of December. It is their Christmas picture. Now we have set it in all of our first-run theatres across the country to open on Christmas Day. Now that means that the picture—and we have timed our magazine advertising and our national advertising to coincide exactly with that releasing time; and that means that that picture will be launched with great emphasis across the

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country in the key cities of the country; and if it be successful in those theatres, certainly the entire trade will immediately and quickly know of it.

At times we have reversed that procedure. At times we have had a picture which has not had any great publicity, or perhaps even great attractiveness in the eyes of the exhibitors, but which we have thought had excellent entertainment value; excellent audience value in the picture. The picture I mentioned before in the first block of 1943-44 program, *Lady Takes a Chance*, is a picture of that type. It was very highly entertaining but it had no prestige to it. So we did the reverse with that picture. We released that picture very slowly, and we staggered it in our theatres across the country so that it would play off slowly, and we would write our contracts at a slow rate until such time as (2323)

through word of mouth and through similar means the trade, and, in turn, the public, would know of the value of the picture; and it worked very well. It was a very successful picture.

Q. What about Hitler's Children? A. Well, this may be lengthy, but that is another use made of our theatres—

Q. That was about the same? Then I will not go into that. It would be similar? A. Yes; but it is a specialized way of distributing pictures, and I must emphasize that it is necessary in my opinion to have theatres to use to achieve those results.

Q. Mr. Mochrie, are there instances where your pictures are not given their first-run showings in RKO theatres in cities where RKO theatres are located? A. Yes, there are.

Q. And why is that? A. Well, that happens when our theatres are unable to provide the length of playing time that we think the picture is entitled to. You see, there are only 52 weeks in a year for a theatre, and the theatre may have commitments to other companies which are releasing pic-

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tures at the same time, and we may have a series of pictures, and the theatre may play a picture two or three or four weeks, and, hence, unless we were willing to wait for the release of a picture in that city for a considerable number of months, we would have no way of playing it in our own theatre. When that happens I sell the picture elsewhere. I (2324)

have done that on several occasions, numerous occasions, in Chicago, where our Palace theatre has been unable to provide us with sufficient playing time, and I sell numerous pictures to the independent Woods theatre.

I have done it on occasion in Washington where our theatre, a long-run theatre, has been unable to provide time, and I have sold pictures on occasions to Warner Bros. for their Earle theatre.

I have done it in Boston. It is done from time to time when we have not sufficient playing time.

Q. Will you tell the Court how RKO goes about selling its first-run customer in cities where there are no RKO theatres? A. Yes. I try to sell the theatre which in my opinion will yield my maximum legitimate revenue on a permanent basis over an extended period of time.

Q. Now that is where there are no RKO theatres. How do you negotiate the licensing of RKO pictures in RKO theatres? A. Well, when I have a normal A picture, a cut and dried A picture, it is very simple. Over the period of years we have developed license terms for the showing of the picture, so that those normal A pictures automatically take those terms. When I have a picture that has abnormal value, either appreciably greater than normal or the contrary, appreciably less, then I have considerable negotiating. (2324a)

I figure and I trade to get the terms I think the picture is entitled to, and the playing time it is entitled to. Sometimes that is a difficult process.

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Q. Does the method which you have described in choosing customers—does that apply to the 92 cities in the United States having a population of over one hundred thousand?

A. Except where my own theatres are, yes, sir.

(2325)

Q. Where your own theatres are, will you explain that, please? A. As I have explained, where we have first-run theatres, my object is to place our pictures in our theatres, and I do so.

Q. Does the same thing apply to other cities other than the 92 cities that you have mentioned throughout the country? A. It does.

Q. What is the basis of negotiation for both the 92 cities and the other cities throughout the country, would you just explain that, where you do not have theatres? A. I say, I endeavor to place my product, all my pictures, with the theatre which in my opinion will earn me maximum legitimate revenue. I am not always successful, but I endeavor to do that.

Q. What factors do you consider in determining the theatre that will bring you the maximum revenue? A. Well, sir, there are numerous factors, the size of the theatre, the location of the theatre, the general appointments and quality of the theatre, the available playing time in the theatre, and the exhibitor; the operator of the theatre himself, that is, his showmanship ability, to properly sell my picture to the public, and his reputation for reliability, a man on whom I can depend to carry out agreements.

Q. Does the suitability of a picture for exhibition, in a (2326)

particular theatre ever enter into your determination in choosing your first-run customer? A. Would you mind repeating that?

Q. I asked if the suitability of the theatre ever entered into your determination in choosing your first-run customer?

A. Oh, yes.

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Q. For any particular picture, of course? A. Oh, yes, surely. If I have a low cost Western picture, I would not endeavor to place it in a large de luxe theatre that is accustomed to showing important A pictures. Wouldn't be good for him and wouldn't be good for me either.

Q. Can you give the Court any instances where these factors have been a reason for your choice of a first-run customer? A. Yes, and I think a good instance is Atlanta, Georgia. In Atlanta, Georgia, our first-run outlet is Lucas & Jenkins, that is the Paramount affiliated circuit, but we license the Goldwyn pictures to an independent theatre, the Rialto, a very small theatre. That theatre has somewhere around seven or eight hundred seats, whereas the Lucas & Jenkins theatres are very much larger. Now, that small Rialto Theatre will exhibit a Goldwyn picture for four or five or six weeks in its first-run showing, and I have found that that theatre throws off a rental for those Goldwyn pictures in excess of anything that those Goldwyn pictures prior (2327)

to then obtained from the Lucas & Jenkins theatres. They pay a good rental for that picture.

Q. Do you attempt to sell RKO first-run pictures to the Rialto? A. No, I do not.

Q. Why? A. Because the Rialto Theatre could not only not take care of the 25 or 30 pictures of mine, it couldn't take care of even a small fraction of those pictures, perhaps not even one or two. You see, in a season, I sell the Rialto two or three Goldwyn pictures, which means that those pictures use up 10 to 18 or 20 weeks of the Rialto playing time, and the Rialto has commitments for other pictures. It plays all of the Columbia product, which means that after the Goldwyn playing time is deducted from the 52 weeks, there is left 35 or 40 weeks, and the Rialto uses that up with Columbia product. There is no playing time available for my

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pictures, whereas Lucas & Jenkins can well absorb my 25 pictures and do absorb them.

Q. And has the size of the Rialto anything to do with the amount of playing time it can provide? A. Yes, surely. It has seven or eight hundred seats only, and if a picture of excellent value, that is, a picture that the public wants to see, plays in such a small theatre in a large city of the size of Atlanta, it will take a pretty long period of time before that (2328)

theatre can take care of all the people who want to see it. That is responsible for the fact that a Goldwyn picture will run five or six weeks in that theatre.

Q. Would the size of the Rialto have any effect on your distribution of pictures to subsequent runs? A. Well, it slows it up, takes five or six weeks for a good picture to play off there, which means I am delayed by that period of time in making that picture available to the subsequent runs.

Q. How does the fact that a theatre is or is not affiliated with one of the integrated companies constitute a factor in your choice of customers? A. Will you please repeat that question?

(Read.) A. Has nothing to do with it.

Q. Based on your experience how do affiliated theatres in general compare from the standpoint of size, location and quality of operation with other theatres? A. In general, I would say that affiliated first-run theatres compare very favorably with all theatres in operating methods, in appointments, in size. Most first-run affiliated theatres are very excellent outlets; they are very excellently operated theatres.

Q. Do you always sell your pictures first-run in the largest theatre in a particular town? A. Usually, not always. Some- (2329)

times the largest theatre is not necessarily the best place to get maximum revenue and sometimes I am unable to sell the largest theatre.

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Q. Can you give us an example, please? A. Yes. In Buffalo we play our pictures first-run in the Twentieth Century Theatre. That is an independent operation. We have played those pictures in that theatre for the last five or six years. It is a good size theatre but by no means the largest. There are several Paramount affiliated theatres, first-run Buffalo, and we used to have them as our first-run account, and we found that for our pictures we were not getting the revenue we thought we were entitled to, and we left them and we placed our product with this independent Twentieth Century Theatre which, although it is not as large, provides us with all the playing time we require and moves our pictures in the manner we think they should be moved and gives us very excellent revenue.

Judge Bright: What do you mean by Twentieth Century, independent theatre?

The Witness: It is independently operated and owned.

Judge Bright: It is not affiliated with Twentieth Century-Fox?

(2330)

The Witness: No, sir. That is the name of the theatre, Twentieth Century. I think the corporate name is Twentieth Century Corporation of Buffalo, and the operator is a man by the name of Yellen, Max Yellen. Has nothing to do with Twentieth Century-Fox.

Q. Would Salt Lake City be another example of the same type? A. Yes. That would be even more pronounced. There again we sold the theatres affiliated with Paramount first-run up to five years or so ago, and there again we found that we were not getting the revenue which we thought we were entitled to and took our pictures away from them and we placed them in a theatre called the Uptown Theatre, operated by

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Joe Lawrence. That theatre has, I think, 1200 seats in it—something like 1200 seats—and I think the Paramount affiliate has two or three theatres of around 1800 seats, but Joe Lawrence has provided us with sufficient playing time and a quality of play-off that gives us more revenue in my opinion than we could possibly get from the Paramount theatres.

Q. Is Lawrence an independent? A. Oh, yes.

Q. Is it or is it not your general policy to try to keep the same outlets from year to year? A. Yes, I do.

Q. Why? A. Well, for one thing, I have endeavored to have our distribution company have a reputation for reliability, and it doesn't jump around, it doesn't put an indi- (2331)

vidual picture on the auction block. I know this, that if I have a good customer in a city, first-run, and he knows that he will receive my pictures block after block, and I know that he will play my pictures block after block, I have an excellent outlet. Sometimes I come with pictures that are not as good as I hoped they would be, or as my company, my producer hoped they would be, but I know that, having behaved myself with the customer, he will behave himself with me and he will play those pictures as they come out one after the other. I endeavor to keep him as a first-run account always, provided, Mr. Leisure, that he maintains in my opinion maximum revenue for those pictures.

Q. Is there any difference in applying that policy between towns where the first-run theatres are both affiliated and independent and towns where all the first-run theatres are independent? A. No, sir, there is not.

Q. Would you say from your experience that exhibitors have evidenced to you any interest in retaining a stable supply of product themselves? A. Oh, yes, yes, they have. They have just the same interest I have. They want to be assured of a stable supply and I want to be assured of a stable outlet.

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Q. Where you have an established outlet for your product, is it usual for an opposition theatre to seek to buy your product? (2332)

A. Not if I have a good outlet, not usually.

Q. Will you explain that to the Court, please? A. Well, it is a close business, people know what goes on in this business, and if competing theatres see RKO product playing regularly in a first-run theatre in a satisfactory manner, they know as well as I know that I am not going to leave that satisfactory first-run account. I won't leave them unless I can be very certain that a new account can pay me materially more revenue, not for one picture but on a permanent basis, and legitimate revenue.

Judge Bright: What do you mean by "legitimate revenue"?

The Witness: I mean, legitimate revenue, terms and rentals that will be profitable to him as well as to me. If I sell a man on fictitiously high terms, by any chance, and such terms are not profitable to him, that man is of no use to me as a customer.

Judge Bright: Don't the other theatres make any effort to get your product from the particular theatre that has been exhibiting it?

The Witness: Not if it is a good customer, not usually.

○ Judge Bright: I mean, don't the competitors make any effort to get your product—

(2333)

The Witness: I say—

Judge Bright: —from your customer then established?

The Witness: I say, not usually. When people make an effort to get my product is when I am running into trouble with my own customer. When my

Colloquy

Customer is not playing my pictures, or when my customer is paying me less rental than should be paid, that becomes known. It becomes known if I, in a certain city, have trouble and am dissatisfied with my present customer—that becomes known—and then most assuredly other people, almost in all instances, are very quickly on my doorstep telling me what terms and what moneys they can pay RKO.

Judge Bright: Then how do you handle that situation?

The Witness: I leave the customer, if I can be sure that this new fellow, who comes in, in my opinion, is a reputable man and has an excellent theatre whereby he, on a legitimate basis—I am sorry I used the word; perhaps it isn't right—but where he can show my pictures and give me high revenue and at the same time make money for himself. If he doesn't make money for himself, then I have trouble; he refuses to play the pictures and he refuses to pay me the terms I think I am entitled to, and when I have trouble, I look elsewhere for another customer or I

(2334)

find other people seeking me out to play my pictures, and that occurs very frequently. There is scarcely a month goes by that there is not some discussion in some place or another because of those reasons.

Judge Bright: I am wondering how the competitors of your customer find out if you are having trouble with your customer.

The Witness: I don't know, sir, but I can only hazard the guess that it is because it is a gossipy business and people usually know what goes on. It is their job to know what goes on. I know what goes and I presume other people know what goes on.

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This whole distribution is a highly, in my opinion, is a highly competitive, fast-moving task, with lots of money at stake, and everyone has his eyes open and his ears to the ground, to know what is going on in all situations at all times.

Judge Bright: When you are having trouble with your customer, do you start to shop around for a new outlet?

The Witness: If he is a good customer and has been a good customer, and if I think that trouble is due to carelessness or something of that nature, I almost invariably go and talk with him, and I warn him. I tell him, "For heaven's sake, you are only headed for trouble if you keep on practicing the things

(2335)

you practice," and I don't want to leave him, if it can be avoided, but if, after a talk with him that way, for one reason or another, either because other distributors are putting more pressure on him for playing time, or through his greed, that he won't pay me the rentals I think I am entitled to, if for any of those reasons, after I wrestle with him, I cannot get any satisfaction, then I will most assuredly go seek someone else. I don't care who he is, big or little, affiliated or independent, if he tosses me around, I will find another outlet for my product.

Q. And you have given already as examples of that sort of thing Salt Lake City and Buffalo, where there was difficulty? A. Just for the reasons I have described, that we left those accounts in Salt Lake City and Buffalo and sought out another account.

Q. But following up Judge Bright's question, where you have a regular outlet and you have a satisfied customer and you are doing business with him regularly, is it usual to have

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anyone else bid for your pictures in that kind of situation?

A. No, sir, it is not.

Q. And you gave as examples Buffalo and Salt Lake City. Would Oklahoma be another example? A. Yes, that is a very curious example. We played our product first-run in Oklahoma City and in several other cities with Joe Cooper, a Paramount affiliate, and we were definitely dissatisfied and (2336)

unhappy with the revenue and with the terms that Joe Cooper, in our opinion, furnished our product, and we went to his opposition, Louis Dent, an independent. That occurred about five years ago. We placed our product first-run Oklahoma City with Dent and have been playing those pictures ever since with Dent, but recently a peculiar thing has arisen. The business in Oklahoma City has boomed and pictures that formerly played three or four years ago for one week in Oklahoma City now play two weeks, so that I now find myself unable to get all the playing time from Dent's theatre. There again there are only 52 weeks in the year and he has other commitments, and I cannot get all the playing time I am entitled to, and I recently took the first two blocks of this current season's product and I went back to Cooper and I sold them to Cooper, but I will continue to sell my other blocks to Dent because Dent cannot absorb, in my opinion, all of my pictures but can absorb a large portion of them. I like Dent and I prefer Dent as a customer, but if he cannot use them all, I will then sell what is left to Cooper.

Q. Mr. Mochrie, is there any agreement between RKO and any other defendant in this case whereby RKO agrees that it will continue to service its present customers and will not entertain bids from others or seek other outlets? A. No, sir, there is not.

(2337)

Robert Mochrie—By Defendant—Direct

Q. I believe you have testified that during the 1943-44 season RKO distributed pictures produced by independent producers? A. Yes, sir, it did.

Q. Who were the most important producers whose product was distributed by RKO during the 1943-44 season? A. Samuel Goldwyn and Walt Disney.

Q. Did each of these producers have the right to designate the theatres in which those pictures should be shown? A. No—Samuel Goldwyn did—Disney did not.

Q. Did each of those producers have the right to refuse to approve any license contract negotiated by you? A. Yes, they both did.

Q. During that season approximately how many contracts involving the product of these producers were made by you? A. I would say somewhere from 10 to 13 thousand contracts a picture.

Q. Can you tell us in how many instances they have instructed you to sell an account different from the account to which RKO was then regularly selling its own pictures?

A. In the case of Goldwyn, under one per cent—somewhere between half of one per cent and one per cent. In the case of Disney, very much less, a very small fraction of one per cent.

(2338)

Q. Speaking for RKO, is an extended run something different from the first-run? A. In my opinion, it is not. I think that—

Q. Will you explain that, please? A. —the term "extended run" is misused, and I do not think there is such a thing as an extended run. I play my pictures in a given city first-run. Now, I play that picture and the exhibitor shows that picture for as long a period of time as the showing is profitable to him. If it be a very successful picture, that the public wants to see in large numbers, it may run four weeks or five weeks or six weeks. If it be a less successful picture,

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it will run one week and perhaps not even run one week, perhaps run a half a week. Some licenses I make with a theatre I make for one week, but the theatre grosses so much in that one week that I require of him—request of him, rather, and he usually agrees, to play it two weeks, and if it grosses very fine business the next week, he will play it three weeks, but in my opinion I have only a first-run. The first-run may be of a duration for as little as two or three days or it may be of duration for as much as five or six weeks, and the thing that determines that is entirely the box office quality of the picture. The man runs the picture as long as he can run it successfully and at a profit and I want (2339)

him to run it as long as he can because the longer he runs it, the more rental I get.

Q. Mr. Mochrie, does the fact that the theatre is affiliated or independent have anything to do with the length of time that RKO will run a picture? A. No, it does not. I fight with them all to run them as long as I can get them to run them.

Q. What factors does RKO take into consideration in determining the length of clearance between theatres? A. It takes into consideration an amount of clearance between theatres in a city which in its opinion, and subject to a clearance condition that has built itself up in that city over a period of time, which in its opinion will yield it the largest revenue, taking all the theatres into account as a whole.

Q. Does the fact that a theatre is operated or controlled by an integrated company constitute any factor at all in deciding the clearance to be granted to it? A. No, sir.

Q. When you negotiate a license as between existing theatres, is there frequent occasion to give consideration to the existing clearance between them? A. Yes, sir, of course.

Q. Do you consider it anew each time that you make such license agreements? A. No, I do not. You see, the factors

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(2340)

which determined originally, at some past time, the clearance as between two theatres, that is, the factors of size and location, and transit facilities between the theatres, the extent to which one theatre competes with another, the prices they charge, rentals they pay, all those factors originally, at some time past, determines the clearance between those two theatres and usually those factors remain stable from year to year.

Q. Then they do not come up even when you negotiate?

A. No, sir, they do not. It is only when something is seriously deranged in those factors that the matter of clearance comes up again.

Judge Bright: Do you have any instances in your practice of clearances different in any particular city from those granted by your co-defendants in this case?

The Witness: Yes, we have. It isn't general or frequent but there are instances, yes.

Judge Bright: Can you think of one?

The Witness: I cannot out of my memory but, given time to look it up, I am sure I can find several.

(2341)

Q. Would Boston refresh your recollection any? A. Boston?

Q. Yes. A. No.

Q. In establishing or changing a clearance between one theatre and another, do you discuss with other distributors the clearance that they are granting? A. No, I do not.

By Judge Bright:

Q. Do you know what they are granting? A. I usually know, but I do not discuss that with other distributors. I am not interested in them.

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Q. Do you discuss it with the customer? A. Very much so. The first thing he tells me is, "I want to buy your pictures on such-and-such clearance, because that is the clearance I get from this fellow, that company and the other company." If in my opinion I want different clearance from that, I have a considerable "rassle" with that man, if he gets the bulk of his product on one set of clearance, in persuading him to change. If I am determined enough that there should be a difference in clearance, I usually have to pay a penalty in getting lesser rentals than I could get for the normal clearance, or perhaps not selling him at all.

Q. Have you any specific instances of that? A. I think I could find them. I can't quote them out of my mind, sir. I know in my experience things of that nature have come up. (2342)

By Judge Goddard:

Q. Where you extend the first-run, doesn't the subsequent run holder object? A. When I extend?

Q. The first-run, yes. A. No. The subsequent run does not know how long a picture will run first-run. These days it never knows. A theatre may play one picture that is unsuccessful for a week, and *Going My Way* is the next picture, and that may run six weeks; and my good picture may follow *Going My Way* and it may run three weeks. The theatre runs that picture as long as it is profitable to him, and I wish him to run it as long as it is profitable to him, because the longer he runs it the more revenue I get. Now the subsequent run theatre is fully aware of that. He knows that that is practiced at all times; that is the common practice of the theatres.

There are very few theatres today left in this country that do not vary the length of the first-run. I mean in cities of any size. There are extremely few theatres that do not vary the length of the first-run; and I would have difficulty, I

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think, in recalling any that play a picture, one picture after another for the same length of time. Your big Music Hall here in New York is evidence of that. It may play a good picture for ten weeks and a poor picture for two weeks. The Paramount theatre does the same. Our own Palace theatre (2343)

atre. Sometimes I have had to take a picture out of the Palace theatre with only one week's showing, and I have lost money on it, but it has been an unsuccessful picture, no one has gone in the theatre, and it is taken off.

Q. Doesn't a subsequent run theatre have to know when it is going to get the picture? A. It knows it will get it so many days after the termination of the first-run, and that termination may occur seven days after it commences its engagement, or it may occur seven weeks after it commences its engagement. That is what I meant before, sir, when I said I do not think there is such a thing as an extended run. There is a first-run of varying duration of engagement.

Q. So the second-run man does not know when he will get the picture; is that right? A. He knows very well when he will get the picture—when it stops playing first-run.

Q. But he does not know the date? A. Surely, sir. As soon as the picture ceases its first-run—

Q. He knows there will be an interval of seven or fourteen days, whatever it is, but he does not know the date he will get the picture? A. At what time doesn't he know it?

Judge Bright: When he buys it.

The Witness: Oh, no.

Q. Is that right? A. Sometimes yes, and sometimes no. (2344)

It depends, sir, on whether the license for the picture for the subsequent run is made prior to the first-run engagement or subsequent to the first-run engagement.

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Q. What is the fact?—Don't you usually make your subsequent run contracts before you make your first-run, or about that time? A. I would say, sir, there is no general pattern. Keep in mind that I do not have any contracts until I trade-screen pictures, and immediately after trade-screening I start releasing the picture; and I have to go out and in a very short period of time sell ten or eleven or thirteen or fourteen thousand contracts.

Q. I had the impression that when a distributor had a picture ready, he made the contracts with the first-run, the second run and subsequent runs all about the same time; isn't that so? A. No, sir; because my salesmen have so many accounts to cover, that sometimes they will see a man before the first-run picture plays and license the picture to him; and sometimes they won't see him until the first-run is playing, and license the picture.

Q. Generally, what is the practice? A. I would say, sir, there is no pattern. Under consent decree selling, sir, you are selling from hand to mouth. You are selling eleven or twelve or fourteen thousand theatres in a very short period of time after the picture has started its play in this country. It is not like the old selling where you sold in September for (2345)

a whole season's product and those pictures came out during the ensuing twelve months.

I have just started selling 'Spanish Main' across the country, and I have to sell fourteen thousand contracts on that picture, and it has already started playing across the country, so you can appreciate that I sell in a very hurried manner; and whether that subsequent run is sold before the playing, during the playing or after the playing, I can assure you there is no pattern in the thing.

By Mr. Leisure:

Q. Mr. Mochrie, if I caught Judge Goddard's question, he would like to know whether in the majority of cases you

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make your contract with the subsequent run while the first-run is being shown? A. Mr. Leisure, I can't answer that. Sometimes before, sometimes during, and sometimes immediately following.

By Judge Bright:

Q. Who is the one that determines whether or not there shall be what you say is not an extended run or a continuation of the original engagement? A. I negotiate that with the exhibitor. When I say "I", I mean my representative or myself negotiates that with the exhibitor while the first-run picture is playing. In some instances it is provided in the contract by what is called a holdover figure. That is, the license agreement with the first-run will say that if the picture (2346)

normally opens on a Thursday, if the gross receipts for the first Thursday, Friday and Saturday reach such and such a figure, that picture shall play for a second week and weeks thereafter provided the gross receipts for the first three days of each week reach such and such a level. That is a mark as to how many people are coming in to see the picture, how successful the picture is. And then I watch those grosses myself very carefully, or my men watch those grosses, because at all times I wish that theatre to show the picture for as long a time as possible; and if that picture—I recollect in Detroit where the same Spanish Main I mentioned opened last Friday. It did a very large business, and that particular license agreement had a holdover figure, if it grosses \$18,000 on Friday, Saturday and Sunday, the picture shall play for a second week; and if it does \$18,000 the second Friday, Saturday and Sunday, it shall play for a third week. Sometimes you don't have those agreements in the license contract, but, nevertheless, I know from experience what a very large gross is, and so does the exhibitor, and I phone him or contact him, however possible, and ask him to show that picture an addi-

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tional week, because it is doing such a fine business, why should he take the picture off. It would be silly. He would be wasting the picture; he would be wasting good entertainment. (2347)

ment. If there are a large number of customers who wish to continue paying 75 cents, or whatever it is he charges in his theatre, to see the picture, why take the picture off? I think he would be very silly, very foolish.

Q. Who says whether he will or not? A. You negotiate with him. Sometimes the contract specifies it, as I have said—

Judge Hand: We are not talking about whether it would be an advantage. Judge Goddard is bothered by this: if they have no definite date, no day in a month for which that picture is ready for a subsequent run, how can any of these theatres that have arrangements for subsequent run, and are not first-run theatres, count on playing any picture? How can they tell when it will be released?

The Witness: I will endeavor to answer that—

Judge Hand: Is it because they have so many options, so to speak, that if they can't play A today, they may fill it in with B, C, D, E or F?

The Witness: Usually. Take New York, for instance, where there are eight or ten or twelve—I don't know exactly how many—first-runs. There are always pictures terminating the first-run in New York and becoming available to the subsequent runs, or any other city. I just mentioned Detroit. Now in Detroit I think there are five first-run theatres, and this week (2348)

maybe two of those theatres will cease playing a picture, and next week one theatre, and the following week two more; but there are always theatres in the

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cities ceasing to play a picture first-run, and that becomes then available thirty days later, or whatever the clearance is, to the subsequent run.

Judge Hand: So they cannot tell with any certainty about any given picture any length of time ahead?

The Witness: No, sir, not on a given picture, but they can tell with certainty that some picture will become available.

By Mr. Leisure:

Q. Following up Judge Goddard's question, by and large, the better the first-run or the extended runs, the more subsequent run playing time that you have, isn't that true?

A. Would you repeat that, please?

Q. In other words, the better the first-run, the better the subsequent run? A. The better engagement the first-run, the more successful will be the subsequent run?

Q. Yes. A. That is indeed true. It is my experience that the longer a picture shows first-run, the more that picture grosses when it reaches the subsequent run theatres.

Q. And following up Judge Bright's question a moment ago, as a distributor are you generally familiar with the clearance granted by other distributors as between given (2349)

theatres? A. As a distributor, am I generally familiar with the clearance that that theatre grants other distributors, or has arranged with other distributors? Yes, of course I am.

Q. And did you make clear just why you are? A. I think Judge Bright asked me that.

Judge Bright: Yes, he told me.

Q. Then on that same subject, does RKO have any policy of adopting the same clearance as those granted by other

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distributors? A. It may adopt the same policy or it may not adopt the same policy. We choose to do what is beneficial to ourselves.

Q. You have no agreements or understandings that you will adopt the same clearance? A. Oh, no, of course not.

Q. Could you explain to the Court why it is that in some situations the clearance granted by RKO to a prior run theatre is the same as the clearance granted by one or more other distributors serving the same theatre? A. Well, it occurs for the same reason we have just discussed. The clearance has been an outgrowth in time between those two theatres, and the exhibitor buys other products on such and such a clearance basis, and offers me such and such a clearance basis.

Q. Now, Mr. Mochrie, I wish to direct your attention to the subject of percentage contracts: RKO Radio Pictures (2350)

licenses pictures under so-called percentage licenses, and also under flat rentals, does it not? A. Yes, sir.

Q. Does RKO in using percentage licenses distinguish between so-called affiliated theatres and independent theatres? A. No, sir.

Q. Do these percentage licenses give RKO a share in the profits of a theatre so licensed? A. No, sir.

Mr. Wright: If the Court please, I submit that the licenses themselves are the best evidence. In this sort of inquiry here he is undertaking to give the contents of some unspecified contract.

Judge Hand: It is allowed. Go on.

A. (Continuing) I said, Mr. Leisure, no. There may be one or two exceptions from that, but the answer is no.

Q. What are those exceptions? A. The only instances that I can recollect where we license a theatre based upon operating cost to the theatre is two Broadway theatres first-

Robert Mochrie—By Defendant—Direct

run, Harry Brandt's Globe theatre and the Capital theatre. I am not certain—I don't recollect certainly that the license was consummated with the Capital theatre, but I was prepared to negotiate with them on a basis that first moneys paid all theatre expenses and advertising expenses, and then the moneys that came in thereafter would be divided between the exhibitor and myself. I did consummate a deal like that with Harry Brandt for his Globe theatre. But (2351)

with those two exceptions I can't recall where we have any profit licenses or licenses based on exhibitors' contracts.

Q. Is Harry Brandt an independent or an affiliated theatre operator? A. He is an independent. The Capital is a Loew theatre.

Q. And you are only speaking there; in describing that, of one deal and not of the regular course of business? A. No, I am describing one deal or possibly two pictures with Brandt, I don't recollect.

Q. Now, referring to the instances you just mentioned, Mr. Mochrie, did you in making these contracts, differentiate between theatres operated or controlled by integrated companies or other theatres? A. No,——

Judge Bright: Why did you make that particular contract with him then?

The Witness: With Brandt?

Judge Bright: Yes.

(2352)

The Witness: I thought that that method would be the best method to give me the most revenue for that particular picture. The other forms of contract that we described, or that we discussed, rather, in my estimate would not have given me as much revenue. It was a matter of trading and negotiation, and I finally arrived on that in my belief that that way for the picture I was selling him I would get the most

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rental. He is a very hard trader, and I was trading with him as hard as I could.

By Mr. Leisure:

Q. Does the quality of the picture have anything to do with whether it is licensed percentage or flat? A. Yes, it has a great deal to do with it.

Q. Will you explain that? A. You see, as a general policy I endeavor to sell as many of my pictures on a percentage basis to as many exhibitors as I can. Now, many exhibitors desire to buy the pictures on a flat rental basis, because in their opinion they would pay less in terms for the picture if bought flat than they would pay if bought percentage. So that if I have a successful, desirable picture, I have more chances of securing from this exhibitor a percentage contract than if I have a less successful picture, he opposing the idea of paying percentage at all.

Q. Now, some percentage deals provide that RKO will (2353)

get a certain percentage up to a certain amount and thereafter a different percentage, do they not? A. Yes, sir.

Q. Would you explain that a little more fully, please, sir? A. Yes. If I negotiate, for example, with an exhibitor on the basis of 35 per cent terms, and if I come to him with a picture which in my opinion is much better than the normal A picture, I will say to him, "I believe this picture will gross materially in excess of what your theatre is normally accustomed to gross, and for the amount in excess of what it is normally accustomed to gross your theatre has made very little contribution, and my picture has made the major contribution; that is, it is the quality of my picture that is responsible for that unusually high gross." And so I say to him, "There is a figure at which I should no longer continue to receive 35 per cent but should receive 50 per cent or 65 per cent or perhaps even 70 per cent."

Robert Mochrie—By Defendant—Direct

Q. And is this so-called splitting figure in any respect based on the theatre's overhead or operating cost? A. No; it is a negotiated figure..

Mr. Leisure: I would like to offer, if the Court please, at this time in its present form, RKO's license agreement. May I have it marked, please, for identification?

(2354)

(Marked Defendant RKO's Exhibit RKO-10 identification.)

Mr. Leisure: I offer it in evidence.

Mr. Wright: No objection.

(Defendant RKO's Exhibit RKO-10 for identification received in evidence.)

Judge Bright: Does that differ in any respect from the sample copies which are in the Government's appendix?

Mr. Leisure: It is the latest form that we have, your Honor.

Judge Bright: You did not quite answer the question.

Mr. Leisure: Whether it varies from the one that is there, I am not really familiar.

Q. I notice that your present form of license provides, Mr. Mochrie: "If the operating expenses of a theatre is an element in computing the amounts payable to the distributor, the distributor shall have the right to examine such books and records relating to such expenses."

That is in paragraph 2 on the back page.

In how many of your licenses are the operating expenses of the theatre an element of computing the amount payable to RKO? A. I can't think of any with the possible excep-

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tion of one or two theatres where our pictures are shown in
(2355)

conjunction with vaudeville and where the terms of the license agreement involve the cost of that vaudeville. In that case I want to be certain of the actual cost of the vaudeville. Other than that I can't think of any instances.

Mr. Wright: If the Court please, I do not think a question like that calls for what he can think of. There is available primary evidence as to what contracts had such terms and what did not; and if this is supposed to be competent proof at all, I would think that that would be the only way it could be made, by the production of at least an analysis of those contracts.

Judge Hand: Have you got such contracts in the case that differ from this?

Mr. Wright: Well, if the Court please, we offered certain contracts between RKO and the defendants which called for percentages and also provide, I believe, certain operating expense deductions. I am not prepared to say just which I think have these figures and which do not; but, in any event, the number of contracts which have those provisions is a matter that is susceptible to mathematical determination by someone in this witness's organization. If they want to examine the contracts and give the result of the examination, that is one thing. But to have the witness just sit here and say what he thinks generally about the thing, I do not see how this is competent.

(2356)

Judge Hand: What about this, Mr. Leisure?

Mr. Leisure: If your Honor please, there are some 100,000 contracts, and I have not asked him about the specific contracts. I have asked him about

Colloquy

anything unusual, and it seems to me the witness can testify to that. Now, if there is any question whatever about it we will make the contracts all available to Mr. Wright.

Judge Hand: I wonder if any of you know whether it adds anything to what is already in the case, because I would rather have you know it than to find it out myself. In other words, I am not interested in varieties of exhibits as an original proposition. You have probably gathered that.

Mr. Leisure: We have offered this as the present form of contract that is being used, your Honor, and I only wanted to call attention to this one provision in it. I will be glad to withdraw it—

Judge Bright: Well, as we are interested in knowing what difference there is, if any.

Mr. Leisure: I know of no difference, your Honor.

Judge Bright: Do you know, Mr. Witness, of any difference in this contract with the one before, this license agreement?

The Witness: No sir, but I would like to add, if I could, to my previous answer; if I qualified my
(2357)

answer I qualified it because, as Mr. Leisure said; we write 100,000 contracts a year, and I cannot swear that every one of those 100,000 contracts is in such and such a manner. But to the very best of my belief, and certainly my policy and my knowledge as general sales manager, we have not any contracts based on operating expenses.

Mr. Davis: May we have the original question that started all this?

(Question referred to read as follows:

Robert Mochrie—By Defendant—Direct.

"Q. I notice that your present form of license provides, Mr. Mochrie: 'If the operating expenses of a theatre is an element in computing the amounts payable to the distributor, the distributor shall have the right to examine such books and records relating to such expenses.'

"That is in paragraph 2 on the back page.

"In how many of your licenses are the operating expenses of the theatre an element of computing the amount payable to RKO?"

Mr. Wright: I submit, if your Honor please, that question can only be properly answered by someone who has examined the contracts they have made and made a tabulation to show how many there are.

Judge Hand: I think you are right.

Mr. Leisure: If your Honor please, I am not asking about any particular contracts; I am asking

(2358)

about a practice that he is familiar with, and he would know if there were any unusual circumstances in which this practice varied; and I do not think it is necessary to burden this Court. Perhaps we have overburdened it with the one contract. To bring 100,000 contracts into this courtroom—

Judge Hand: Well, go on. Do you really want to put this thing in or not?

Mr. Leisure: I would like to have it in, if the Court please.

Judge Hand: Well, I have no clear way of knowing why, but I do not know that it does any harm.

Mr. Leisure: I only attempted to show that we used in very limited cases, this audit right, and having it here in this place, it may be of convenience to the Court.

Robert Mochrie—By Defendant—Direct

By Mr. Leisure:

Q. So much for percentage licenses, Mr. Mochrie. When do you use a flat rental for RKO pictures? A. When I can't sell percentage.

Q. And from the standpoint of your company, is a flat rental deal more or less desirable than a percentage deal?

A. It is less desirable.

Q. Why? A. First of all—let me express it this way: whether the man pays me a flat rental or whether he pays me a percentage, he, in effect, is paying me some percentage (2359)

of the gross receipts of the engagement. If he pays me \$50, \$50 will represent some percentage of the gross receipts of the engagement. The reason why he does not wish to pay a percentage, such as 35 or 30 or 40 per cent, is that he feels that in paying me a flat rental he can pay me a lesser percentage than 35 or 30 or 40 per cent—

Mr. Wright: If the Court please—

Mr. Leisure: Just a moment.

Mr. Wright: The witness has just undertaken to state the reason why an exhibitor will not do something. He is not competent to say what reason is in the exhibitor's mind when he refuses to do anything or agrees to do anything.

Mr. Leisure: I think the witness is only stating a negotiation in which he participates.

Judge Hand: Go ahead. We will allow it. But this is getting very long. I wish you would close it up.

Mr. Leisure: We will go right along, your Honor.

The Witness: I had not finished the answer.

Mr. Leisure: Sir?

The Witness: I had not finished the answer.

A. (Continued) Now, that is the first reason I do not like flat rental contracts; and the second reason I do not like

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flat rental contracts is that in many instances I may lose, but in no instances can I gain. If the picture involved grosses less money than anticipated, many exhibitors will (2360)

come to me and ask for a reduction in the flat rental. But if the picture grosses much more than was anticipated, no exhibitor will come to me and offer me an increase in the flat rental. So there is nothing to gain and I have everything to lose.

Q. I assume all your pictures which you license are copyrighted? A. Yes, sir.

Q. The contract form used by RKO states:

"If no admission price is written into the contract, the exhibitor shall charge not less than 10 cents in the afternoons and 15 cents in the evenings."

—Why is that provision printed in your license agreement? A. Because in our opinion to sell our pictures to the public for lesser admission prices than those admission prices would debase motion picture entertainment and would ultimately harm the exhibitor and harm us.

Q. Do most theatres charge an admission price in excess of 10 cents in the afternoons and 15 cents in the evenings? A. Yes, they do.

Q. In certain instances minimum prices are inserted in your contracts in a space provided for that purpose, are they not? A. Yes, sir.

Q. For what purpose is such a minimum price inserted? A. To maintain our revenue.

Q. Now, in determining whether you will insert a minimum (2361)

admission price in your contract, do you take into consideration whether or not the theatre is an affiliated theatre?

A. No, sir, I do not.

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Q. And in licensing your pictures for exhibition in theatres affiliated with any defendant, do you agree in the contract, or agree orally, upon the admission price to be charged by subsequent-run theatres? A. No, sir, I do not—

Mr. Wright: The contract speaks for itself, if the Court please.

Judge Hand: Overruled. I think everybody has testified to this.

(2362)

Q. Now, there is a charge of reciprocity dealing between integrated companies in this case, Mr. Mochrie. The other day when Mr. Rathvon was on the stand we offered a chart in evidence purporting to show the lack of reciprocity, Exhibit 9. Judge Goddard pointed out that there did not appear to be much connection between the blue standard representing RKO and the red standard representing the other companies. Do you recall that? A. I have some remembrance of it.

Q. Now, that chart covered only one season. Let me ask you the general question: Have you ever licensed RKO pictures to theatres affiliated with an integrated company on the condition or understanding that that company license its pictures to any RKO theatres? A. Oh, no.

Q. Or on the condition or understanding that that company extend particular terms to any RKO theatre? A. No, sir.

Q. Does the fact that an integrated company licenses its pictures to any of the RKO theatres in any way affect your readiness to license your pictures to theatres affiliated with such an integrated company? A. No, sir.

Q. Or have any bearing on the terms which you will extend to theatres affiliated with such integrated company? A. No, sir.

Robert Mochrie—By Defendant—Direct

Q. Mr. Mochrie, do you keep yourself advised of the (2363)

terms upon which Warner Bros., for example, is licensing its pictures to the various RKO theatres? A. I do not.

Q. Have you ever informed yourself as to the terms that RKO theatres have been paying to Warner Bros., for example, for its pictures? A. I have not.

Q. Could you obtain that information from the RKO theatre department if you wished it? A. I don't know. If I pressed hard enough I suppose that I could, but I am not interested in it. I have got my pictures to sell, and they have got their troubles, and what they pay for Warners', I don't care.

Q. But you say you never have obtained that? A. No, sir, I have not.

Q. And would the same apply to the terms that RKO theatres are paying to the various other integrated companies? A. Apply to the terms they pay for anything or everything. That is their problem, not mine.

Q. Has any representative of the RKO theatre department at any time asked you to license RKO pictures or to extend particular terms on RKO pictures to theatres operated or controlled by another integrated defendant? A. No, sir.

Q. The other day here in court Mr. Wright asked a witness for instances where the distributor had sold its first-run to independent theatres, and that theatre took clear- (2364)

ance over affiliated houses that played the film on subsequent runs. Does RKO sell any independent first-run theatres that take such clearance over second-run affiliated theatres? A. Many.

Q. Can you give us any example? A. Yes, I can. I can give the example of Buffalo, New York, where we play first-run in the independent Twentieth Century Theatre, and our

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pictures play subsequent-run in the Shea theatres. I am not sure whether those are Loew theatres or Paramount theatres. Loew's do the buying.

I can give Oklahoma City as an instance that I mentioned before, where we sell our product first-run to Louis Dent, an independent, and the Cooper subsequent-run theatres, a Paramount affiliate, show our pictures.

I can give you Long Beach, California, as an example where we show our pictures first-run to the independent Milton Arthur, and the Fox subsequent-run theatres show the same pictures after that first-run.

Q. That would be, I think, enough examples, Mr. Mochrie. A. It occurs in many, many instances.

Q. Yes. In the course of the same examination Mr. Wright inquired whether there were any independent first-run accounts where the independent exhibitor operated two or more theatres and on occasion moved a film over from one to the other on a continued first-run. Does RKO license any (2365)

independent first-run accounts that have theatres in which they move over the better pictures for extended first-runs?

A. It does.

Q. Can you give us any example on that? A. Yes. In Portland, Maine, Ralph Snyder, an independent, plays our pictures, and the better pictures he plays first-run at the Strand Theatre with a move-over to the Empire. Mullins & Pinanski, a Paramount affiliate, play the same pictures subsequent-run in Portland.

In Long Beach, California, that I just mentioned, Milton Arthur on a good picture will play it day and date in two theatres, and move it over to a third theatre first-run, and then Fox subsequent-run theatres play the picture.

Q. That will be enough examples, Mr. Mochrie. Are you familiar with the features distributed by RKO during the 1941-42 season? A. Yes, sir.

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Q. Was the play-off of the picture *Suspicion*, typical of the results of your highest grossing pictures of that season?

A. I would say yes.

Mr. Wright: What season is this?

Mr. Leisure: 1941-42 season.

Q. Was the play-off of *Mexican Spitfire's Baby* typical of the results of your lower grossing pictures of that season?

A. Yes, sir.

(2366)

Q. And would the play-off records of these pictures be typical of the play-off of pictures of equivalent box office quality today? A. I think so, yes.

Q. Now, one more question, Mr. Mochrie, and I shall be through: You have been associated with distributors which have theatres affiliated with them and with distributors that have no theatres, have you not? A. I have.

Q. Based on your own experience, will you tell the Court what in your opinion would be the effect on RKO as a distributor if the company were to cease to operate theatres of its own? A. Yes. I think that if we ceased to operate theatres of our own, distribution would undoubtedly and surely and materially suffer. I have worked for distributors who had no theatres, and I have worked for distributors who had theatres affiliated with them, and I am very certain that the fact that RKO has first-run theatres scattered in these large cities across the country is of definite and material value to me as a distributor and enables me to secure larger revenue than I would otherwise.

Mr. Leisure: Judge Bright, over the noon hour I should like the privilege of checking this contract, and if I find it is similar to the one in evidence, I should like the opportunity to withdraw it, if I may.

Judge Bright: Surely.

Robert Mochrie—By Defendant—Direct

Mr. Leisure: Are there any other questions?

Mr. Seymour: I have a couple.

(2367)

Q. Mr. Mochrie, does RKO license pictures to some of the theatre operating companies in which Paramount is interested? A. Yes.

Q. Where it does so license its pictures, do you know where the negotiations for the license are conducted? A. I do.

Q. Where are they conducted? A. They are conducted in the city in which that particular circuit has its offices.

Q. That is, they are conducted in the city where the head office of the theatre operating company is? A. That is correct.

Q. And for example, for United Artists, Detroit, that is Detroit? A. Conducted in Detroit; for Willoughby, it is conducted in Atlanta; for O'Donnell, it is conducted in Dallas, and so on.

Q. Is it conducted by the manager or the operator of that particular company on behalf of that company? A. The manager and/or his chief buyer—his buyer, his booker.

Q. Do you know where the payments for license fees by those companies are made? A. I do.

Q. Are they made by the theatre operating company? A. They are.

Q. That is, each theatre operating company pays for the pictures, the RKO pictures it licenses, is that correct? A. It

(2368)

does.

Q. Are those payments made by the operating companies from their offices? A. They are made from their offices to our particular exchange that serves that particular company.

Robert Mochrie—By Defendant—Direct

Q. Do officers or employees of Paramount participate in any way in negotiations between RKO and those theatre operating companies? A. No, sir.

Q. For licensing of RKO pictures? A. No, sir.

By Mr. Proskauer:

Q. You describe your distributing organization, that you operated at an expense, you said, of approximately seven million dollars a year? A. Yes.

Q. Do the other chief defendants here all maintain similar kinds of distributing organizations? A. Yes, they all have exchanges and managers and so on.

Q. And they have salesmen and checkers and all the same kind of machinery that you described? A. Yes.

Q. Why do you have to maintain a large organization like that to sell pictures? A. Because I sell eleven thousand accounts and I have to have a wide-flung organization to sell eleven thousand accounts.

Q. Are the other defendants also trying to sell those eleven thousand accounts? A. Very much.

Q. And you are in absolute, keen, continuous competition all the time to sell those pictures? A. Yes.

(2369)

Q. And it is for that reason that you spend seven million dollars a year to maintain an organization to sell pictures competitively? A. Yes. Can't be done cheaply.

By Mr. Raftery:

Q. You know Abe Montague, don't you, Mr. Mochrie?
A. I do.

Q. You have known him a good many years. A. I do.

Q. Do you consider him an able distributor of pictures?
A. I think he is a very fine man and a very able distributor.

Robert Mochrie—By Defendant—Direct

Q. Who do you think is the best man to decide the policy of Columbia as to the manner and method of selling? A. Of the actual selling?

Q. Yes. A. I would certainly say Abe.

Q. And the same applies to Bill Scully of Universal?

A. I would say so.

Q. So your opinions as to the value of trade showing and that type of selling are expressed for RKO and RKO only, isn't that correct? A. That is correct.

Mr. Leisure: Any other questions? (No response.) Your witness, Mr. Wright.

Mr. Wright: If the Court please, there are a number of documents I will have to examine before I complete my cross-examination. If we could have a recess now, I think the whole cross-examination would be shortened.

(2369-A)

Judge Hand: All right. We will adjourn now until ten minutes before two.

(Recess until 1:50 p.m.)

(2370)

AFTERNOON SESSION

Judge Hand: The clerk says there was an exhibit marked 9 for Columbia and it should be 9-A. Is that your understanding?

Mr. Frohlich: Yes.

Judge Hand: Mark it 9-A.

Mr. Leisure: Judge Bright, on this contract, I have checked it over the noon hour and I find that this contract in July of 1945 was streamlined and revised, and the reason that we wanted to offer it at this time was that we thought the questions were im-

Robert Mochrie—By Defendant—Cross

portant and, instead of having the questions refer to some prior contract, we felt they should refer to the contract which we actually use. However, I find that the changes in the streamlining did not affect the materiality of the contract for the purposes of this case, and since the record is rather large, I would like to withdraw it, with the Court's permission. The reasons we put it in are the reasons I have explained.

Judge Goddard: That is 10, isn't it?

Judge Bright: Yes.

Mr. Leisure: Your witness, Mr. Wright.

ROBERT MOCHRIE, resumed the stand.

Cross Examination by Mr. Wright:

Q. Mr. Mochrie, the negotiations with the independent exhibitors are generally carried on, are they not, by the sales-
(2371)

men and the branch managers? A. Depends on who it is. Some I carry on, some the division, the district manager, branch manager and the salesmen.

Q. I said generally. A. The small exhibitors, yes.

Q. In those negotiations at any time the salesman or the branch manager always has authority to refuse to take an application, isn't that right? A. Generally, yes.

Q. That is true all the way up the line until a proposed deal gets to you, isn't that right? It may be rejected at any stage but it may only be approved in New York, isn't that right? A. Yes, but if I may, let me explain the answer: Inasmuch as you said up the line. The contract applications go from the branch direct to the home office. They don't go through the district manager.

Q. I see. In this negotiating that goes on between your salesmen or branch managers and the ordinary, independent

Robert Mochrie—By Defendant—Cross

exhibitor, there is no set price for each picture or set terms that are demanded or received, isn't that right? A. There is not a set price but there is a policy.

Q. Well, the policy I take it is to see that as many of the pictures in the block are sold as is possible, isn't that right, at the best terms that you can get? A. Not quite.
(2372)

Q. Well— A. The policy is, of course, to sell as many in the block as possible but the different pictures in the block have a policy, which I give to the salesman, or to my people, as to the general classification of that picture.

Q. Let us take the specific situation where, let us say, the exhibitor might indicate to the salesman that he would like to buy two of the pictures and not the other three. Under those circumstances there might very well be a different price on the two that he wanted than if he bought the entire block, isn't that correct? A. I don't think so, no.

Q. Well, do you know? A. Yes, I do.

Q. What is the fact? A. The fact is this, that I have a policy for each picture of the block each time I release a block and the salesman in negotiating with the exhibitor endeavors to sell the exhibitor the five pictures and describes the rental terms he wishes for each picture. If he is unsuccessful in selling the five and, as you mentioned, ends up in selling three, those prices have been described to the exhibitor, and I believe—I don't sit in on all the salesmen's negotiations, but I say to the best of my ability, I believe—those prices are the same whether—per picture—whether he sells the three or the five.

(2373)

Q. Is there anything in your instructions to the salesman which prevents him from pricing the pictures differently depending on the number which are purchased in his negotiations? Is he bound in all circumstances to say, "Now, here is a 35 per cent picture. If you want this alone you

Robert Mochrie—By Defendant—Cross

can have it for 35 per cent regardless of whether you take any more"? A. I think generally he would sell it that way.

Q. Well, that was not my question as to what you thought he would do. I am asking you what your instructions are. A. I have no instructions one way or the other. I describe a picture as a 35 per cent picture, and if he obtains 35 per cent terms for it we will approve the contract.

Q. As far as any instructions he gets from you, or any binding directions as to what the policy should be, he is perfectly free, is he not, to use such bargaining devices as he can to get that entire block sold, isn't that right? A. Certainly he is free to bargain as best he can; certainly he is free.

Q. In any event, the terms that you come up with on any particular deal that you make, I suppose is dependent ultimately on the bargaining strength of the parties involved, whoever they may be? A. Or the bargaining skill.

(2374)

Q. Yes. Now, I think you gave some direct testimony about not making agreements where you split profits. I will show you this Government's Exhibit 255, an agreement between your company and United Detroit Theatres for first-run exhibition of a picture in the Michigan; and I will ask you to read to the Court there the terms that you see at the top as to how the first-run rental is to be computed. A. It says: "Bride By Mistake, Michigan Theatre 30 per cent of gross receipts to 20,867 and 50 per cent of gross receipts thereafter."

Q. Then there is a further note, isn't there, about reversion? A. I beg pardon?

Q. Isn't there another line there about reversion to 25? A. Yes, sir. "If gross is less than 20,867 terms revert to 25 per cent."

Robert Mochrie—By Defendant—Cross

Q. Now, that figure 20,867 is what you refered to in your direct examination as a splitting figure, isn't it? A. It is indeed.

Q. Which you said is a matter of negotiation? A. Yes, sir.

Q. Now, just how is that splitting figure negotiated? A. I will tell you, because when I first occupied my job I negotiated several pictures with Earl Hudson who operates the Michigan Theatre, and so I know. I asked him for 35 per cent terms and was unable to obtain them, and he would not (2375)

give me more than 30 per cent, but he said he would give me a split, and he said he would give me a split of 23 or 24 thousand dollars, and I asked for a lower split. I said with my knowledge of the grosses that this theatre has, that is too high a split entirely. However, we bickered around, and he said, "I will give you 20,867." I still wanted a lower one and could not obtain it, and I took the 20,867.

Q. As a matter of fact, that figure 20,867 is a figure at which you and he knew that the theatre there would be unable to earn a certain profit, isn't that correct? A. No, sir.

Q. You say it is not a fact that when you negotiate a split figure you attempt to determine the figure with some relation to what profit the theatre will earn when that gross has been reached? A. My attempt, Mr. Wright, is to get as low a split figure as possible. The theatre's attempt is to get as high a split figure as possible. The theatre man on many occasions says, "I cannot give you such and such a split figure because I do not have much profit. My overhead is too high. I cannot afford to give it to you."

But he says that to me. I do not know anything about the man's overhead; and if you will excuse me for saying so, in most instances I place very little reliance in his statement

Robert Mochrie—By Defendant—Cross

(2376)

as to that. He is trading with me to get it high and I am trading to get it low.

Q. Well, in the course of your experience you have made it a point, have you not, to have a pretty accurate idea of how much a theatre has to gross on any business it does in order to make a profit? A. I have no source of information. I do not know how much it costs him to operate his theatre. I guess. I guess in the same sense that I would guess how much this courthouse costs.

Q. You make no effort to determine what the gross figure is which enables him to make a profit when you negotiate a split figure, is that right?

The Witness: Will you please repeat that?

Mr. Wright: Will you read it.

Q. (Read.) A. Of course not. I do not have to worry about that. He will take care of his own profit.

Q. I will show you this Exhibit 258, relating, I believe, to the exhibition of your pictures in some Fox theatres, and ask you to read to the Court the provision in the lefthand column there as to how the rental terms are to be computed.

Mr. Seymour: May we see that, Mr. Wright?

Mr. Wright: When he gets through with it.

A. You mean "20 per cent to 40 per cent plus 50 per cent in excess of 40 per cent sliding scale"?

(2377)

Q. Yes. Now, just how do you go about determining the actual rental under that formula? A. I am not certain but I think the 20 per cent to 40 per cent refers to a sliding scale. That is, if the picture grosses so much it pays 20 per cent. If it grosses more it pays 21 per cent, 22 per cent, and so on up to 40 per cent. And then I think that at the

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40 per cent figure, if it grosses in excess of that, we shall receive 50 per cent of the moneys in excess of that figure.

Q. In other words, you have there a whole series of split figures, isn't that correct? A. You have what is commonly termed a sliding scale.

Q. And that sliding scale, I say, is in effect the use of a series of split figures or controlled figures? A. It is a series of figures after each of which the distributor shall receive a higher percentage rate.

Q. Now, is it also your testimony that in negotiating split figures and sliding scale deals of that kind, you make no attempt to determine what the profit of the exhibitor would be at the various sliding scale points? A. I would like to be able to say a plain no to you, Mr. Wright. If you will permit me I will tell you about it. I am somewhat familiar with this because the Fox affiliate or the Fox section here presented us with this type of deal two or three years ago. They stated that they would purchase my picture (2378)

on this formula, and although we were reluctant—specifically I was reluctant—to accept it immediately, I studied the formula that they presented me for each of these situations against the gross receipts that my picture had done in the past to determine whether in my opinion this was an advantageous formula. When I found that it was, and after I endeavored as a trader to obtain lower figures but was unsuccessful, I then said I would go ahead on that deal.

Judge Bright: Let me see that, will you, please.

The Witness: Yes, sir (handing).

Q. Then in each case you, of course, use whatever past experience your company has as to the expenses and profit possibilities of the theatre in negotiating the deals, isn't that right? A. I have no past experience as to expenses. The

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only past experience I have is with the gross box office receipts of the theatre.

Q. Now, is it your testimony that RKO has never in the past negotiated license deals with theatres of another defendant in this case which were made expressly dependent upon the determination of house expenses? A. I stated, or I intended to state, and so state, that RKO does not negotiate deals in general based upon house expenses of the exhibitor.

Mr. Wright: Now, if you will just listen to the (2379) question and see if you can answer it.

Q. (Read.)

The Witness: I do not recollect that that was my testimony—

Mr. Leisure: I submit the answer is responsive.

The Witness: —it may have been. I do not recollect that that was my testimony.

Q. Well, in any event, where you had negotiated such deals, or if it appears that you had negotiated deals in the past where the house expense has been revealed to you, then you have a pretty definite idea in negotiating any subsequent deal as to at what point the theatre will earn a profit, isn't that right, the gross figure? A. If the exhibitor revealed to me his house expenses I would have his word for it. I cannot recollect any instance where I have audited or caused to be audited his expenses to determine what they actually were.

Q. Well, you don't know, do you, as you sit there the extent to which RKO has in the past made the deals with any of these other defendants which involved a disclosure of house expenses as well as gross receipts? A. I know for the period of my incumbency in the job I now have, yes. I know that they have not.

Robert Mochrie—By Defendant—Cross

Q. That is since what date? A. That is since the summer of 1942.

Q. You don't know about the prior deals? A. No, sir. (2380)

Q. Calling your attention to your testimony about these independent producers you distribute for, which were the ones who have the right of license contract approval? A. In the season of 1943-44, Disney and Goldwyn. Since then we have acquired for distribution the pictures of International, so in the following season all three, Disney, Goldwyn and International.

Q. Perhaps I misunderstood you. I thought you said the picture "Lady Takes a Chance" was an International picture. A. No, sir, I did not.

Q. Did you— A. If I did say it, I beg your pardon, I had no intention of saying it.

Q. That was one of your own? A. No, sir, that was an independently-produced picture.

Q. It was an independently-produced picture, but one in which the producer did not have any right of approval or rejection of contracts? A. That is correct.

Q. What were the Goldwyn pictures that you said were played in the Rialto, the independent first-run in Atlanta there, instead of in the Lucas & Jenkins houses, where the rest of the RKO product played? A. Wonder Man, the most recent Goldwyn release; Princess and the Pirate; North Star; Up In Arms; Pride of the Yankees, I believe, and, I think, Ball of Fire, but I am not quite certain—that was released three or four years ago and I do not quite— (2381)

Q. What was the first one that went in there? That is what I am trying to get at. A. I would say either Ball of Fire or Pride of the Yankees.

Q. That was during what season? A. Pride of the Yankees, I believe, was in the season 1942-43, and I am not

Robert Mochrie—By Defendant—Cross

sure as to whether Ball of Fire was in that season or the preceding season.

Q. If I understand you correctly as to the relation between Goldwyn and yourself, the decision to play those pictures in the Rialto and not in the houses of the Paramount affiliate was Goldwyn's and not yours, isn't that correct?

A. The initiation of playing the pictures in that Rialto Theatre was my own, following Goldwyn's refusal or statement that the revenue he obtained from Lucas & Jenkins was unsatisfactory, and he wished me to find another customer than Lucas & Jenkins. When he stated that he was entirely dissatisfied with Lucas & Jenkins as a customer and wished me to find another customer, I then came up with the Rialto.

Q. The Rialto then played the pictures and paid him for those first-runs much greater rentals than he had ever gotten out of the first-runs in the Paramount affiliated houses, isn't that right? A. It paid him greater rentals. I don't recollect how much greater, but I am certain they were greater.

Q. I understood you said, as to the RKO, the rest of the (2382)

RKO product, you had no negotiations with the operator of the Rialto for first-run on any of those pictures, correct?

A. I believe I have had none, but I am not certain whether my district manager has had any or not.

Q. And I think you said on your direct examination that you knew that he did not have enough playing time to give you any more money on any other RKO pictures than you were already getting, isn't that right? A. No. I said that he did not have enough playing time to make room for my pictures.

Q. Do you mean by that make room for all your pictures?

A. I testified as to that. To repeat what I—

Q. As a matter of fact, the first-runs of the Paramount affiliate there do not give all your pictures first-run in one of their downtown houses, do they? A. No.

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Q. And didn't during that season? A. No, and probably won't next season or any other season, because the first-run Atlanta is single feature, and I have some inexpensive B pictures that I do not believe that that type of theatre can afford to play first-run, and I don't much expect they will play first-run.

Q. Do you want to be understood as saying that you knew without any negotiations with the Rialto that the Rialto could not give you as much first-run playing time as the Paramount affiliates? A. I will go even further. I will say (2383)

that they cannot give anything compared to the playing time I get from Lucas & Jenkins.

Q. And that is without having discussed with the Rialto people what playing time might be available to you and on what terms? A. Yes, sir, but I would like permission to go further with that answer. I distributed, as I testified this morning, United Artists pictures as Southern district manager and had my headquarters in Atlanta and was—and am very familiar indeed with the Rialto Theatre, and on numerous occasions, as United Artists district manager in Atlanta I tried to place pictures in the Rialto Theatre, screened them for the exhibitor, who is blind, but has a very keen sense of hearing and judges a picture by sound, and have been unsuccessful in selling him the pictures. I am very certain that the Rialto Theatre would not play a minor picture of mine any more than the Music Hall in New York would play a minor picture.

Q. I was not talking about minor pictures. I am talking about your top pictures. A. I have answered—

Q. Suitable for first-run exhibition. A. I have answered the top pictures by saying the Rialto does not have sufficient playing time to accommodate those top pictures.

Robert Mochrie—By Defendant—Cross

Q. You determine that by observing the fact that the only first-run product that the Rialto had, in addition to the Goldwyn pictures, is product of Columbia, is that right? (2384)

A. Yes, indeed; and it is perfectly obvious to any picture man or film man that if a Goldwyn picture can run five weeks in the Rialto Theatre and the Rialto Theatre has all of the Columbia product under contract, that that Rialto Theatre has no open time for other pictures.

Q. How many pictures of RKO's, as compared to Columbia for that 1943-44 season, would you say were suitable for first-run exhibition, really top pictures? A. Suitable where?

Q. Well, that represent the first-run exhibition in Atlanta, let us say. A. To answer accurately, I would have to have a list of the pictures of both companies in front of me, but, offhand, for the season 1943-44, and eliminating the Goldwyn pictures, I would state roughly, or feel roughly, that it would be a standoff, that our product had about as much quality pictures in it as Columbia did.

Q. About how many of yours did you get exhibited first-run in Atlanta at the Paramount affiliates there? A. I would have to look up the figure. I can't recollect.

Q. Can you give us any rough idea, five, ten? A. I would have to look it up, but I am sure that it is a reasonable number.

Q. You cannot tell us what it is, whether five, ten, fifteen or twenty? A. No, I cannot. It is one of hundreds of accounts, and I can't remember what happened to my pictures (2385)

in the season 1943-44 in all the first-run accounts.

Q. Do you remember whether you sold that first Goldwyn picture that went into the Rialto for subsequent-run to Lucas & Jenkins? A. No, I do not.

Q. You say you don't know whether you did or not? A. I beg your pardon. I know that the course of the Goldwyn

Robert McChrie—By Defendant—Cross

pictures in that instance was this: The picture, the first picture, that I sold the Rialto Theatre, first-run Atlanta, I was unable to sell Lucas & Jenkins in any situation, so that would include their subsequent-runs, and it may be the second picture, but I do know that somewhere along the line I sell—now sell Lucas & Jenkins the Goldwyn pictures for their situations with the exception of the Rialto Theatre Atlanta first-run and with the exception of an indendent to whom I sell the Goldwyn pictures in Savannah and in Macon.

Q. That has only been true within the last year, has it not? A. I can't say, Mr. Wright. It wasn't true at the start. It is true now. Somewhere in between it became true.

Q. On this matter of how many times one of your first-run accounts plays a picture before it becomes available to subsequent-runs, I suppose that is almost always determined, is it not, by contract terms? A. Did you say how many (2386) times?

Q. Yes, as to the number of times that your prior run exhibitor may show the picture before it becomes available to a subsequent-run competitor, I suppose that is ordinarily a matter which is determined by whatever terms are written into your contract with the first-run exhibitor, isn't that right? A. I believe he shows it only for what I call one showing. He shows it for one first-run showing. He does not bring it back again.

Q. You have heard of situations, have you not, where your first-run account has the privilege of bringing back a picture he plays first-run and then repeating it before it is made available to a subsequent-run? A. I don't want to give incorrect testimony but I do not think I have heard of that, no.

Q. You have never heard of a situation, for example, where your first-run account has played a picture first-run for three days at a 35-cent admission and then brought it back later for a week's run at another theatre at a 15-cent

Robert Mochrie—By Defendant—Cross

admission? Ever hear of that situation? A. I have not, no. I recall that we have sold some pictures to an independent opposition in the Saenger towns in Mississippi and Louisiana where we wrote contracts with the independent theatre wherein he agreed to play the picture one—the first engagement for so many days, and then he agreed to repeat the picture (2387)

ture within a two or three months period; again for so many days. Other than that, I cannot recall selling a picture to a first-run account wherein he had the privilege such as you just described.

Q. In any event, where you do give him the privilege, if the contract does give him the privilege of bringing the picture back and it contains no minimum admission price restrictions, there is, of course, nothing to prevent him from bringing it back and playing it at a longer time at a low admission price, is there?

Mr. Leisure: Just a moment.

A. I say, I don't recall any such contract.

Q. You are quite sure you never had such a situation brought to your attention? A. I would not swear to such a thing. As I said this morning, my company handled too many hundreds of thousands of contracts over a period of years for me to be certain of every one of those contracts, but, to the best of my belief, I cannot recall such a type of contract. I would not write it.

Q. Let me call your attention specifically to a situation in which you were involved, Macon, Georgia. Do you recall that? A. I recall that the Goldwyn pictures were sold in Macon, Georgia.

Q. You recall that Lucas & Jenkins operates the first-run theatres there in Macon? A. Yes, sir, I do.

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(2388)

Q. And you recall there was a theatre there named the Bibb Theatre? A. That I am not certain of, but I recall there is an independent exhibitor there.

Q. And you recall that that exhibitor complained to you that he could not find out from you when your pictures were going to be available to him after Lucas & Jenkins got through with them, isn't that right? A. I don't recall that.

Q. Don't you know, as a matter of fact, that he complained specifically to you about the fact that Lucas & Jenkins had taken one of your top pictures and played it first-run for three days and then later brought it back and played it for a week at 15 cents, the same price that he was charging for subsequent-run product? A. No, sir, I do not, but I do have a recollection of an interval in first-run with that account. The account's name is Mrs. Weiss. And I recall selling her a Goldwyn picture first-run Macon, Georgia, and her refusal to play that picture for a reasonable number of subsequent days, stating that she had in the middle of the week either bank night or a stage attraction or something of that nature, and that she did not wish to play the Goldwyn picture with this already profitable change, and I finally agreed with her, that she could play first-run Macon, Georgia, the Goldwyn picture for so many days, then stop playing it and then continue playing it after that interval. (2389)

val. That is about all the recollection I have there.

Mr. Wright: Mark these with the next plaintiff's numbers.

(Marked Government's Exhibit 388 for identification and 389 for identification.)

Q. I show you this Exhibit 389 for identification and ask you if you recognize that as a letter signed by you, dated August 6, 1940?

Robert Mochrie—By Defendant—Redirect

Mr. Leisure: Have you a copy of that, Mr. Wright?

Mr. Wright: No, we have not.

A. I do. I don't recollect it. I acknowledge it.

Q. Will you look at this copy marked Exhibit 388 for identification and see if you recognize that as the letter that you replied to by 389? A. I don't recollect the letter; I mean, I am not able to say whether this letter or another letter was received by me. I do acknowledge this letter as having been sent by me.

(2390)

Q. Well, read it and see if it refreshes your recollection as to what was occurring down there at Macon at that time?

A. (Reading.) No, sir, I do not.

Mr. Wright: That 388 is a copy and obviously not admissible in the absence of a failure to produce the original on the part of RKO, and not having served them with a notice, I shall not offer it at this time.

Mr. Leisure: You have not offered it yet, have you, Mr. Wright?

Mr. Wright: No. I say I am not offering it because it is plainly a copy. I am asking you to produce the original.

Mr. Leisure: We make no point about the original. May I just ask the witness a question, Judge Hand?

Judge Hand: Yes.

Redirect Examination by Mr. Leisure:

Q. Mr. Mochrie, did you receive this letter? A. I do not recollect having received it.

Mr. Leisure: Could we make a search and get the original if there is one, Mr. Wright?

Colloquy

Mr. Wright: Surely.

The Witness: Mr. Leisure, I receive hundreds of letters a week, year in and year out, and I cannot remember receiving it, but the letter sent is obviously my letter.

Mr. Leisure: You see, your Honors, this is not a signed letter. It is a typewritten letter, and I would

(2391)

just like to make a search for the original.

Mr. Wright: I think we have nothing further with the witness at this time.

Judge Bright: Mr. Mochrie, in this Exhibit 258 to which you have already referred, you give the terms 20 per cent to 40 per cent plus 50 per cent in excess of 40 per cent. Then there are the words "Sliding scale S, B. Min is S. B. or D. B." What does that mean?

The Witness: I noticed that. I do not recollect, your Honor.

Mr. Wright: It is a single bill or double bill.

The Witness: Maybe someone would help me.

Judge Bright: He says single bill or double bill.

Mr. Wright: Is that what it is Mr. Mochrie?

The Witness: That is what it probably is. I am sure that would mean sliding scale, single bill, minimum is—oh—sliding scale, single bill, minimum is single bill or double bill. I think that last line means that we shall not receive less than twenty per cent, whether our picture was played alone or in conjunction with another picture. That is, minimum is single bill or double bill. I have tried to make that as clear as I can.

Mr. Seymour: Have you any further questions?
I have a couple.

Mr. Leisure: I have no questions.

Robert Mochrie—By Defendant—Recross
(2392)

Recross Examination by Mr. Seymour:

Q. In connection with the questions advanced this morning, Mr. Mochrie, about the exhibition of first-run I should like you to deal with that a little further: Is a first-run extended on all pictures? A. I have tried to make clear that I do not really know what you mean by extending a first-run. Poorer pictures run a short length of time first-run, and better pictures run a longer period of time first-run, because better pictures gross more in the theatres, and hence the theatre, whatever theatre it be, will run it longer because it grosses more money.

Q. So that there are a number of pictures which run a fixed number of days in accordance with the theatre's policy, and then in the run of that picture I suppose the subsequent run exhibitors know when that stops? A. Yes, indeed.

Q. And then there are some very successful pictures that play a more extended first-run, is that right; that is, a longer first-run? A. Will you permit me to say a little on this whole thing?

Q. Yes, indeed. A. Many contracts first-run, whoever the first-run may be, provide for a hold-over figure which I described this morning. That is, if the business for the first several days of, let us say, the week's engagement exceeds a certain amount, the theatre agrees that it shall play for
(2393)

a second week; or if it does that for a second week, the third week. There are not many cities in the United States that run pictures three, four, five or six weeks. There is a limited number of large cities which can do that. But it is customary in those large cities to have such agreements dependent upon the business the picture does.

Now then, the distributor likes that not only for the revenue which he receives through those additional weeks, but because by reason of the playing of additional weeks the

Robert Mochrie—By Defendant—Recross

picture is very thoroughly advertised in that area, which the subsequent runs benefit by, which they do not pay for but which they benefit by; so that those subsequent runs know that if an excellent picture of mine runs in this large city four or five weeks, they know that that picture will do excellent business for them because of the large extent of the advertising such a picture has received during that period of time.

Q. Now, generally speaking, the subsequent runs in those cities play pictures for a shorter time than the first-runs, isn't that so? A. Oh, in all cities, of course.

Q. But aren't there some pictures of high quality and high box office success which are played longer by second and subsequent runs than their normal pictures? A. Oh, yes; you do not have to go any further than New York. A very fine picture of mine will play RKO subsequent run (2394)

theatres for a week, a less fine picture will play five days, and a poor picture will play two days.

Q. How about the runs after the second? A. The same thing applies.

Q. So if the picture is a success, first-run or later run, it will play longer than the average picture? A. The same thing applies more or less to all theatres in the United States, whether they be subsequent run or first run or what not. The bigger the gross by reason of the importance of the picture, the longer the theatre will show that picture.

Q. Now, how does the second run operate, the exhibitor? A. I beg your pardon?

Q. How does the second-run exhibitor ascertain when the picture will be available to his theatre, and when does he ascertain it with reference to the termination of the first-run? A. I will tell you: in any city, numerous pictures from numerous theatres come off of first-run; they complete their first-run. Now in the interval between their completion of

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the first-run and the start of the subsequent runs, which is not singular but plural, many subsequent runs, in that interval, which is called the clearance interval there is a pool of pictures from which that subsequent run exhibitor can specify which pictures he shall play and when he shall play them.

(2395)

Q. By a pool, you mean that each exchange of each distributor has some pictures— A. No, no. I used the pool as—it is a group of pictures.

Q. Mr. Wright uses it invidiously. A. I did not use it in any legal way. I use it as a group of pictures into which he can almost dip his hand and pick out that which will suit him best to run. Now, the size of that group or pool of pictures varies in various cities. For example, here in New York, in our own RKO circuit, sometimes I have to wait for a play date because our RKO theatres have numerous pictures available to them to play, and they choose to play someone else's before mine, and I wait; or they choose to play mine, and the other pictures wait. It is so in all cities.

Q. Does the subsequent run exhibitor receive from the exchange any notice of the availability of these pictures to it? A. Oh, yes. My exchange, of course, sends out availability notices. I do not know—I mean I don't know other exchanges' business, but it is trade practice. I am sure they do the same.

Q. So far as you know, the exchanges of other distributors do the same thing? A. Of course they would.

Q. So the exhibitor has a number of notices of availability on a number of different pictures from different distributors from which to choose? A. That is what I meant when I said
(2396)

he has a pool of pictures from which to choose.

Q. Is a subsequent-run exhibitor, be he second run or later, ever left high and dry—that is, without a picture—as

Robert Mochrie—By Defendant—Recross

the result of the fact that a prior run plays a picture somewhat longer than is its normal practice? A. Oh, no, because while one prior run is playing a picture longer by reason of its great success, another prior run or several prior runs are throwing off less successful pictures which are becoming available to subsequent run. I never heard of a subsequent run dark house. I never heard of a subsequent run that does not have pictures from which to select.

Q. Normally, when does a subsequent run begin to advertise, by newspaper advertising and display advertising at the theatre, and trailer advertising in the theatre, the fact that a picture is coming to that theatre? A. After the termination of the first-run. You see there is that period of time which is clearance. The fact is, probably, that is one reason for clearance. There is that period of time in which the subsequent run, following the termination of the first-run, advertises the picture as coming to his theatre, he having selected that picture, the particular one, from the group of those available.

Q. And during that period he is able to take whatever steps he wants in order to assure public interest in connection with that picture? A. Yes. And I think that that advertising is one reason he likes to follow a picture that runs a long time. He receives all of that free advertising of the picture itself. It is not advertised as coming to his theatre, but the picture itself is advertised to the people of that community.

Q. Just one or two other questions that I neglected to ask before. When RKO licenses pictures to the Butterfield company, with whom does it deal? A. Ed Beatty.

Q. Does RKO ever deal with Publix for pictures with the Publix theatres? A. No. Ed Beatty or his assistant licenses all pictures.

Robert Mochrie—By Defendant—Recross

Q. In Detroit? A. I beg pardon?

Q. In Detroit? A. Yes, he has offices in Detroit.

Mr. Seymour: That it all.

By Judge Gouldard:

Q. How is that group determined? Is it one of a block of five, or less than five? How does he know what group he is going to get his pictures from? A. I will tell you, sir. It is the pictures which come off of the various competing first-run theatres that have finished their engagements. I would illustrate here in New York. This week in New York City a picture may finish first-run from the Paramount, the Roxy, the Capitol, the Globe, the Rialto, or what not. I do not say they have finished, but I say that whole group of (2398)

pictures finishes the competing first runs. And then the second run chooses which picture, if it has not already got it under contract, it shall contract for a run. But he has that group of pictures to choose from, not a group from one distributor, but a group from many distributors, and from many first-run theatres. I have tried to make it clear to your Honor. Perhaps my language is not as clear as it should be.

Q. It is not one of the five, not one of the group of five, or what? You say he may select any distributor's pictures. But how do you know he has a contract with another distributor? A. Oh, I don't know he has.

Q. How does he get the pictures if he has no contract?

A. Places it under contract.

Q. Makes a new contract at that time? A. Makes a contract for the first time for the picture. Let me illustrate, if I may, sir. Let me illustrate the City of Detroit: the picture may finish this week playing the Michigan theatre first-run. That picture may be my picture, an RKO picture. A picture may finish the same week playing the Fox theatre first-run. That may be a Fox picture. A picture may finish

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playing the United Artists theatre this week first-run. That may be a Metro picture. A picture may finish playing first-
(2399)

run at the State Lake theatre this week. That may be a Paramount picture. And a picture may finish playing the Downtown theatre first-run, and that may be a Republic picture. Now there are five pictures, sir, that have finished first-run. Now the subsequent run can choose to put under contract whatever of those five pictures he chooses to. He may choose mine and not choose the Metro or the Fox, or he may choose the Fox, because he thinks it is better than mine, and not choose mine. Sometimes I do not obtain from him a second run or a third run because my quality can't compete with the other fellow's, and the same thing happens to the other fellow.

Q. I still do not see by what right he can say "I will take this picture from Paramount" when he is your customer, unless you have an agreement with Paramount, or something of that sort. A. Oh, he is a free agent. He buys whatever picture he chooses to buy, the same as you would buy whatever suit of clothes you choose to buy.

Q. How is he assured he is going to get the picture?
A. It is there for him. If he does not use it, who is going to use it?

(2400)

Mr. Seymour: Let me see if I can ask another question that will approach that matter from a little different angle and perhaps bring out what Judge Goddard has asked.

By Mr. Seymour:

Q. The ordinary second or subsequent-run theatre in New York uses approximately how many pictures a year?

A. The ordinary second-run theatre in New York?

Robert Mochrie—By Defendant—Recross

Q. Second and subsequent-run. A. Well, the ordinary second-run theatre in New York would probably use two pictures a week, being double feature.

Q. That is 104 a year? A. 104 pictures a year.

Q. Those are features? A. Those are feature pictures.

Q. Now, I suppose the number the subsequent-run uses varies. Can you state any average that an average subsequent-run theatre in New York would use? Would it be twice that number? A. Yes, it could be.

Q. There are many subsequent-run theatres in New York which change their programs twice a week? A. Yes.

Q. And sometimes they change them three times a week?

A. Yes.

Q. And many that have double features? A. Yes, sir.

Q. And if they change their programs twice a week they would require 208 pictures a year? A. They would require four times 52, which is 208.

(2401)

Q. And if they change their programs three times a week they would require over 300? A. 6 times 52, which is 312.

Q. Now, how many pictures does any one distributor, how many feature pictures does any one distributor make available in the course of a year? A. Well, I make available, as I testified this morning,—last year I made available 22 of my own and eight independents. I made available a total of 30 in a year.

Q. I think there is testimony here that Paramount in the last season made available something like 29 and other distributors make available somewhat similar numbers. A. Yes, they run about that.

Q. And some more? A. From 20 to perhaps 40.

Q. So in order to supply the needs of a second-run exhibitor or a subsequent-run exhibitor in New York, it is necessary for that exhibitor to contract with a number of distributors, is it not? A. Oh yes, of course.

Robert Mochrie—By Defendant—Recross

Q. And he could not possibly obtain his supply of product from even any one, two, three or four distributors? A. That applies to the many, or, in fact, most of the subsequent-run theatres of America. They consume, most of those theatres, from a minimum—and there are not so many which use only 104—up to 312, and it might be a higher number. There (2402)

might be some late runs which change every other day and bring back a lot of reissue pictures mixed in with new pictures.

Q. So that most of the subsequent-run exhibitors contract for the product of a number of distributors? A. Yes.

Q. And are free to make any choice they wish among the pictures made available to them by the procedure you have already mentioned? A. Yes, sir.

Q. So that a subsequent-run exhibitor—with particular reference to Judge Goddard's questions—might at the same time have under contract in order to supply his theatre for a particular week pictures of six different distributors; isn't that so? A. That is correct.

Q. And he might have bought a block of five or licensed a block of five from one distributor and perhaps from another in order to supply his theatre for a particular month? A. Oh, yes.

By Mr. Raftery:

Q. And he may have bought all the product of Universal and Columbia to fill the entire time if there should be a lapse? A. That is correct.

Q. That is one of the reasons Universal and Columbia are able to sell their entire program in advance to take care of the needs of these exhibitors, isn't that right? A. Yes, sir, it is.

(2403)

Mr. Seymour: I just want to ask you one more question.

*Robert Mochrie—By Defendant—Recross**By Mr. Seymour:*

Q. Mr. Mochrie, the exhibitor has a so-called booking book on which he indicates when he would like to play these pictures, and communicates with the exchange and arranges to play them that way, subject to the arrangements with the exchanges, is that right? A. Yes, he does.

Q. With the various exchanges? A. Yes, he does.

Recross Examination by Mr. Proskauer:

Q. I would like to ask you just a question or two more about these longer first-runs: Does the subsequent-run exhibitor prefer the picture which has a longer first-run over the one that has a shorter first-run? A. I stated that before.

Mr. Wright: If the Court please, he is not competent to answer that question.

Judge Hand: I think he has been over it.

Q. When I say "does he prefer," I mean is it your experience in the trade that that is more eagerly sought after by the subsequent-run? A. He has found from experience that it will gross more business for him, and certainly he wants it.

Q. Now, he suffers for that the impossible inconvenience (2404) of not knowing the exact date on which he is going to get that picture? A. I don't think he suffers at all. I think he is very glad to have a picture like that available to him.

Q. I used the wrong word—

Judge Hand: Yes.

Q. —but I am glad I used it because you have corrected me quite forcibly. A. I beg your pardon, sir; I did not mean to.

Robert Mochrie—By Defendant—Recross

Q. I thank you. You do not owe me any apology. Now, as a matter of fact, he gets a notice of availability which is a regular form that goes out, doesn't it, as to when this picture is going to be available on this second-run? A. He does from me, yes.

Q. You know enough about the way other people do business to know that that is quite the general practice in the trade? A. Every company I have worked for has practiced it.

Q. So well in advance of the time this picture is going to become available to him he gets a notice that the picture is going to be available? A. Yes, he does.

Q. And then he gauges his trailers or his advertising on that notice of availability? A. That is correct.

Q. And meanwhile he has a general program for his theatre, as you have described? A. He does all that during (2405)
the clearance interval between the first-run and himself.

Mr. Proskauer: That is all.

Mr. Leisure: That is all, Mr. Mochrie.

Mr. Leisure: If your Honors please, that completes the witnesses that we are going to call from the industry. Mr. Wright has been good enough to stipulate with me the testimony of the head of our production department, so that we have not had to bring him here from California, and that will save considerable time, and at the appropriate time I would like the privilege of offering that affidavit.

We have a short accounting witness on some statistics, which I am going to ask my associate Mr. Whittlesey to examine on, but that will be very short.

James D. Miller—By Defendant—Direct

JAMES D. MILLER, called as a witness on behalf of the RKO defendants, being duly sworn, testified as follows:

Direct Examination by Mr. Whittlesey:

Q. Mr. Miller, where do you live? A. Bronxville, New York.

Q. What is your occupation? A. I am a certified public accountant.

Q. Are you the senior partner of James D. Miller & Company (2406)

pany, certified public accountants? A. I am.

Q. Is your firm regularly employed by any company which is a defendant in this case? A. No.

Q. Was your firm retained by Radio-Keith-Orpheum Corporation to examine certain books and records in connection with the present case? A. Yes.

Q. Have you been in charge of that work? A. I have.

Q. In this connection did you make an examination of certain records to determine in what theatres each of the defendants in this case had some direct or indirect interest? A. Yes, I did.

Q. Will you tell us just what those records were?

Mr. Davis: May I hear the last question?

(Question read.)

Q. (Continuing.) Will you just tell us what those records were? A. They were lists of theatres compiled by each of the five producer-exhibitor defendants.

Mr. Proskauer: We cannot hear you, Mr. Miller. Will you please raise your voice.

A. (Continuing.) They were lists prepared by each of the five producer-exhibitor defendants that were submitted

James D. Miller—By Defendant—Direct

to the Government. We got copies of them and worked from those copies.

Mr. Wright: If he is referring to exhibits in evidence, can't you tie them up so we will know what
(2407)

he is talking about?

Mr. Whittlesey: I do not know the exhibit numbers of all those lists, but the witness has just testified he used copies of the lists which each of these defendants turned over to the Government. If you will let me go a little further, I think we can develop this to your satisfaction.

Mr. Wright: All right.

Q. Using those copies of those lists which the various companies turned over to the Government, showing their theatre interests, did you prepare a composite list from all those five? Must have been five lists, isn't that so? A. Yes.

Q. And have you that composite list with you here? A. I have.

Q. May I have it? A. (Witness hands to Mr. Whittlesey.)

Mr. Whittlesey: I would like to have this marked.

(Marked Defendant RKO's Exhibit RKO-11 for identification.)

Judge Hand: Has Mr. Wright seen this thing, and does he dispute its correctness?

Mr. Whittlesey: No, Mr. Wright hasn't seen it, your Honor. I am going to offer it after it has been described a little more fully. I am trying to have it brought out now just exactly what we have here.

(2408)

Q. Mr. Miller, will you tell us what this list shows in some detail? A. Yes. It lists alphabetically by states and

James D. Miller—By Defendant—Direct

by cities all the theatres in which any of these five producer-exhibitor-defendants have any interest.

Q. As shown by the copies of lists which I gave you, is that correct? A. It lists every theatre that is shown on those lists, and it shows also the seating capacity of those theatres, and it shows which one of these defendants has an interest in that theatre.

Q. Does it show, after the name of the theatre, anything as to the extent of the defendant's interest? First let me ask you this: Does it show, after the name of the theatre, anything to indicate which defendant or defendants have an interest in the theatre? A. Yes, it shows which defendant and the degree of interest.

Q. Will you tell me just what it shows as to the degree of interest? A. The degree of interest is the degree of interest which was set forth on these lists of theatres which we have received. There were only two of those lists that showed that degree of interest. That was RKO and Paramount.

Q. In other words, there are some cases where the degree of interest was not shown at all? A. That is right.

Q. You have the degree of interest on your list there, have you not? A. Yes, we have.

(2409)

Q. I would just like to come to that in a moment, but before doing so, perhaps you can answer this question: Are you familiar with a somewhat similar type of list which the Government prepared and set forth in Appendix A to its trial brief? A. Yes, I am.

Q. Can you tell us briefly how the list which you have here compares with the list which the Government set forth of theatre interests in its trial brief? A. Generally, it is in conformity. We show 20 theatres more in total than the Government list. As a matter of fact, our total is 32 greater. There are some clerical errors in the Government list that accounts for a difference of 12.

James D. Miller—By Defendant—Direct

Q. In other words, the Government did not add up their theatres quite exactly on that list? A. That is correct, and, in addition to that, we have 20 more theatres.

Mr. Wright: What is the Government list referred to?

Mr. Whittlesey: Set forth in their trial brief, the affiliated theatres appendix.

Judge Bright: It this the list to which you are referring (indicating)?

The Witness: Yes, it is.

Judge Bright: On page 7 of the trial brief—pages 7 and 8.

The Witness: Of Appendix A.

(2410)

Judge Bright: No, not of Appendix A. This is the trial brief.

Judge Hand: Why don't you submit this brief to them and have the thing checked up? We don't love exhibits here a bit.

Mr. Whittlesey: I could avoid doing that. I will either submit it to him or put it in evidence. I am going to think, in just a moment, about submitting it. I want to get out here just what we had.

Judge Hand: You just put another thing in evidence, and I suppose we are the ones who should worry.

Judge Bright: That is not the list mentioned.

The Witness: The list starts on page 11 of the Appendix A of the trial brief.

Q. Mr. Miller, I believe you said that in some cases in setting forth the interests of the defendants in these particular theatres you did not have any information from the defendant in question but I gather you have set forth an interest of some sort after each one of them, is that correct?

A. We have.

James D. Miller—By Defendant—Direct

Q. When you did not have the information from the defendants, what did you do, so as to set forth an interest? A. We followed the Government Appendix A in the trial brief.

Q. When you followed the interest stated by the Government (2411)

ment in its Appendix A of its trial brief, did you do anything on your list to indicate you were following the interest stated by the Government? A. Yes, there the interest is marked in blue.

Q. In so doing, would I be right in understanding that you were endeavoring to get this list worked up as nearly as possible in conformity with the list which the Government has used in its trial brief in this case? A. That is right.

Q. And I believe you have told us the extent to which it does conform, that there is a difference of about 20 theatres? A. We have, in the aggregate, 20 theatres more than the Government.

Q. When there has been any question as to the extent of interest to be stated, you have taken the basis set forth by the Government in its own trial brief, is that right? A. We have.

Judge Hand: What about this, Mr. Wright? Have you seen it?

Mr. Wright: I was just looking at it now.

Judge Hand: You have got it now?

Mr. Wright: Yes.

Judge Hand: I do not see what in the world is the use of correcting things in this cumbersome way. There is no use taking testimony in court unless there is a real dispute.

(2412)

Mr. Whittlesey: Perhaps I can clear that up, your Honor. We set out here to analyze the information

Colloquy

which the Government asked from us in the form of interrogatories and requests to admit facts. To do that we had to necessarily segregate the exhibitions between affiliated and unaffiliated theatres. That required, in turn, a study of the information given by each one of these five defendants to the Government with respect to their theatre interests. I might say this, that about the middle of September I suggested to the Government attorneys that we might speed up this process all the way round if they were to furnish to me their list. I shan't say they refused. I spoke to the attorneys here in New York. They said that their information at that time, and their lists and their accountants were in Washington. At that time we were closely approaching trial, so I had to go ahead with my own accountants here and do the best we could, using the same source of information as the Government had to build up the same thing. All I am endeavoring to bring out here is, what we are working from is as near as we could possibly get without seeing the Government's own list, by working from the same basis of classification of interest.

I am perfectly willing not to offer this and let Mr. Wright have it. I certainly intend him to have it, so
(2413)

he can check back what we have done here.

Mr. Wright: This is exactly of course what we ought to have in the record, but without any dispute, that is, there should be one list like this that is accepted as correct by everyone.

Judge Hand: Yes. What about that list?

Mr. Wright: I cannot check it as I sit here, of course, but the only thing I noticed about it, offhand, is, I do not see how the pool situations are treated. Maybe the witness will make that clear. Offhand it

Colloquy

does not appear to me where those pooled theatres are listed on this list.

Mr. Whittlesey: The witness will tell you, I believe, that he set forth opposite the name of the theatre the extent of interest that any company had in the theatre.

Mr. Wright: Of course, your Honors, there is no point in wasting time in court over it. It is obviously the sort of thing that we are both interested in having in the record in accurate terms, and I am sure we can do that.

Judge Hand: This, unless I am mixed up, which is quite likely, would furnish a list, if you agreed to it, that would be agreeable to all the five defendants.

Mr. Whittlesey: I don't know, your Honor.

(2414)

Judge Hand: Is that right?

Mr. Whittlesey: Of course, this represents our best efforts to work out the degree of interest that each defendant has in the theatre, but we cannot bind Paramount.

Judge Hand: Do you mean the other defendants have agreed with you?

Mr. Whittlesey: No.

Mr. Seymour: I have never seen it.

Judge Hand: Oh, you have never ~~seen it~~?

Mr. Davis: I haven't seen it.

Judge Hand: I have nothing to suggest, only I do not like an independent performance unless it is absolutely necessary.

Mr. Whittlesey: Suppose we do this—

(2415)

Mr. Proskauer: Your Honor, I have never seen it, but I understand that they are just going to use this as a basis for some further testimony of this witness,

James D. Miller—By Defendant—Direct

and I am perfectly willing to have this marked subject to correction, as far as we are concerned. We will go over it. And I suggest if Mr. Wright do that, we can go ahead.

Mr. Wright: That is agreeable to us.

Mr. Proskauer: Then mark it subject to correction.

Mr. Whittlesey: I will offer it subject to correction.

Judge Bright: Does that give the names of the theatres?

Mr. Whittlesey: Yes; perhaps I should show it to your Honor. It is indexed.

I offer this list, subject to correction.

Judge Bright: It has a little more information in it than there is in the Government brief.

Mr. Whittlesey: We think it is a more accurate job, but perhaps Mr. Wright won't agree.

Judge Bright: It gives the name of the theatre?

Mr. Whittlesey: Yes.

(Marked Defendant RKO's Exhibit RKO-11.)

Mr. Davis: May I see that, if nobody else is using it?

Q. Mr. Miller, did you make an examination of certain (2416)

answers by RKO in response to the Government's request to admit facts in this case and specifically those answers dealing with the first-run distribution of RKO's 1943-44 product in these 92 cities of over 100,000 population? A. I did.

Q. Can you tell me how many first-run exhibitions of RKO's 1943-44 product there were altogether in these cities of over 100,000 population, as shown by those answers to

James D. Miller—By Defendant—Direct

the Government's request to admit facts? A. There were 3,614 first-run exhibitions. I would like to make clear that that is not exactly the number that was shown in the data submitted to the Government, but we have since provided the Government with all the corrections.

Q. I think you furnished me with the corrections, and I will have to give them to the Government shortly. Were those corrections substantial or to any great extent? A. No, they were not.

Q. Of that total of first-run exhibitions in the theatres in these 92 cities, were there theatres in which RKO or another defendant—how many were in theatres in which RKO or another defendant had an interest of 50 per cent or more? A. 2,317.

Q. And for the purposes of your analysis here, did you classify those exhibitions as in affiliated theatres? A. I did. I would like to qualify that answer just a bit. That will (2417)

include exhibitions in theatres in which there might be a less than a 50 per cent interest, such as, well, for instance, Paramount has a lot of theatres in which they have a 50 per cent of a 50 per cent interest.

Q. But you classified even those, for the purposes of this job, as being in affiliated theatres? A. I did for this purpose, yes.

Q. How many of the total of 3,614 exhibitions were in theatres in which no defendant had any interest, or in which a defendant or defendants had a less than 50 per cent interest? A. That would be 1,297.

Q. For the purposes of this analysis you classified those as in unaffiliated theatres? A. Yes.

Q. Tell me one further figure: Of this total of 2,317 first-run exhibitions, which you say were in theatres which you classified as affiliated, how many of those were in

James D. Miller—By Defendant—Direct

theatres operated by RKO itself? A. 822. I am talking now about exhibitions, not theatres.

Q. That is what I understood. Eliminating these 822 first-run exhibitions in theatres operated by RKO, what percentage of first-run exhibitions of RKO's product in 1943-44 was in theatres which you have classified as affiliated with other defendants and what percentage was in theatres which you have classified, as you have explained here, in theatres which were not affiliated? A. It was almost an equal (2418)

division, 53½ per cent of the exhibitions were in what we term affiliated theatres and 46½ per cent in unaffiliated theatres.

Q. When you say "affiliated theatres," you mean theatres which were affiliated in accordance with your classification with other defendants than RKO, is that correct? A. That is correct.

Q. You said you eliminated these 822 exhibitions which were in RKO's own theatres. Why did you do that? A. Because we assumed in making these tabulations, and I think that was testified to by Mr. Mochrie today, that RKO gives first-run preference to its own theatres over all others, whether independent or affiliated.

Q. So for the purpose of determining the extent to which RKO favored or did not favor other affiliated theatres over independent theatres you entirely eliminated the exhibitions in RKO's own theatres? A. Correct. That is the only way we could get a true picture.

Q. I believe you also said a moment ago, in making up these figures you classified as exhibitions in unaffiliated theatres certain theatres in which a defendant or defendants had less than a 50 per cent interest, is that correct? A. That is correct.

Q. Of that total of 1297 exhibitions in unaffiliated theatres, how many were in these theatres in which defendants

James D. Miller—By Defendant—Direct

(2419)

had less than a 50 per cent interest? A. There were 181 such exhibitions.

Q. Only 181 out of a total of 1,297? A. Well, out of a total of 3,614.

Q. Out of a total of 1,297 classified as independent? A. Yes.

Q. Did you make one more computation in which you took these 181 exhibitions in theatres in which defendants had less than 50 per cent interest and include those in the exhibitions in theatres in which defendants had a 50 per cent or greater interest? A. Yes, we made such a computation.

Mr. Davis: Why not say in that question, in which some one of the defendants had a 50 per cent interest?

Mr. Whittlesey: That would be correct.

Mr. Davis: We object to being grouped in whole.

Mr. Proskauer: We are just as choosy.

Q. What was the purpose of this computation you are speaking of now, Mr. Miller? A. The Government claims in this case that any theatre in which a defendant has any interest should be regarded as affiliated, so we made this calculation to go along with the Government on its definition—

Q. Theory.— A. (Continued) —of affiliation.

Q. (Continuing) —of affiliation, I see. And going along (2420)

on this Government basis of determining affiliation, how did your figures work out? A. 60 per cent of the first-run exhibitions were in affiliated theatres, and 40 per cent in unaffiliated.

Mr. Whittlesey: I would like to have this marked.

(Marked Defendant RKO's Exhibit RKO-12 for identification.)

James D. Miller—By Defendant—Direct

Q. Mr. Miller, I show you this chart and ask you whether that correctly reflects the figures which you have just testified to? A. It does.

Q. I wish you would explain that chart a little more in detail to the Court, if you can. A. This chart deals with the distribution of RKO's entire product for the 1943-44 season, which included 38 features, 32 of which were of its own production, and six—

Mr. Davis: A little louder, please.

A. (Continuing) 38 productions, 32 of which were of RKO's own production, and six were produced by others. The chart is limited, however, to first-run exhibition. It is further limited to such first-run exhibition in the 92 cities, which according to the 1940 census, had a population of over 100,000.

Q. Mr. Miller, those were the 92 cities with respect to which the Government addressed requests to admit facts to RKO, is that correct? A. That is correct. There were 3,614 such exhibitions. The purpose of this chart is to show to (2421)

what extent RKO's product was exhibited in affiliated theatres as contrasted with unaffiliated theatres. This deals with the allegation that RKO—

Q. I don't think we need that. Will you tell us what the blue section of the chart indicates. I wish you would take these various columns and describe them in a little more detail for us right now. A. The blue shows the number of exhibitions—that is, the blue block on the left shows the number of exhibitions—in theatres in which RKO had an interest of 50 per cent or more and in theatres controlled by RKO in which RKO and another defendant had an aggregate interest of 50 per cent or more; the middle column, the one in yellow, shows the exhibitions in theatres in which one or more of the

James D. Miller—By Defendant—Preliminary Cross

defendants, other than RKO, have an interest of 50 per cent or more; the last column on the right shows all other exhibitions; and at the top are shown the number of theatres—number of exhibitions in theatres in which one or more of the defendants had an interest of less than 50 per cent; and the bottom part, the exhibitions in theatres in which no defendant had any interest whatever.

Mr. Whittlesey: That is all for that chart.

Mr. Wright: Before it is offered I would like to ask the witness some questions about it.

Preliminary Cross Examination by Mr. Wright:

Q. How do you get this total figure of 3,614, your (2422)

affiliated exhibitions? A. We took the data that was submitted to the Government which showed the distribution of it—

Q. Have you a copy of the data that you worked from there? A. Yes, I have.

Q. That is the admission of facts showing the first-run distribution of 1943-44 product? A. Yes.

Q. Go ahead. A. This data that was submitted to the Government has a sheet for each city having a population in excess of 100,000, and on that sheet is shown the distribution of RKO's 1943-44 product, that is, 38 features. This shows what theatres that product was played in in that season.

Q. You have the same thing I have. Calling your attention specifically to Akron, Ohio, there—that is the first sheet which you have? A. Yes.

Q. I notice that that shows 18 pictures first-run at the Colonial Theatre, Warner-Shea, and then 18 to Harry Katz at the Palace, and then you have two licensed to R. Postman for first-run exhibition in the Norka Theatre. Under your

James D. Miller—By Defendant—Preliminary Cross

total exhibitions, then, for Akron, you took all of those, that is, total of 38, is that right? A. That is correct.

Q. And you made no effort to determine whether or not those exhibitions in the Norka, for example, were in a first-run theatre, is that right?

(2423)

Mr. Whittlesey: I believe, Mr. Wright, you requested us to give you the first showing of each picture in these particular towns. As you know, that is all the request to admit facts called for, and that is what the answers gave.

Mr. Wright: I will examine the witness and we will go on further.

A. This states that those two pictures were licensed in the Norka Theatre for first-run exhibition.

Q. And as far as you know, that simply meant that the exhibition in the Norka was the first in the town for those two pictures; Norka may have been a third or subsequent-run house as far as you were concerned, is that right? A. I have no information on that theatre except—no, I don't think I even have the seating capacity.

Q. You gave the same treatment to all of this data in computing your total number of exhibitions, is that right?

A. Yes.

Q. You call them a first-run exhibition on your chart, even though they may have actually been exhibitions which are covered in a subsequent-run theatre with subsequent clearance to exhibit simply for the first time in the town in that house? A. I was concerned with first-run exhibitions. I was not concerned with the type of theatre it played in.

Q. Your chart, then, does not reflect at all the extent, or
(2424)

does not reflect accurately the extent to which RKO's product

James D. Miller—By Defendant—Preliminary Cross

was divided among the independent and affiliated first-run theatres in the town in question, isn't that right? A. It accurately reflects first-run exhibition.

Mr. Wright: Just read the question to him.

Q. Just answer my question.

Mr. Whittlesey: I think he has answered it.

(Question read.)

A. I cannot say yes or no to that because it does not tend to classify these first-run exhibitions as to types of theatres other than whether they were in affiliated theatres or unaffiliated theatres.

Q. Your chart on its face then does not even purport to show the division of the RKO product among the affiliated and independent first-run theatres in the town in question, isn't that right? A. It does not deal with theatres as to whether they are first-run theatres or subsequent-run theatres.

Q. That is, the slough product that might have gotten an exhibition anywhere, all those exhibitions of such product as may have been rejected by an affiliated theatre for first-run and then shown in some later independent house for its first exhibition, all of those are treated on your chart as first-run exhibitions, is that right? A. All I know is that we are dealing here with first-run exhibition.

(2425)

Mr. Wright: If the Court please, I think enough has been shown to demonstrate that the chart is clearly misleading in including as first-run exhibitions these exhibitions where a picture was not good enough to get a first-run in a first-run house, but, of course, found its way down into some house and actually got exhibited in the town for the first time anywhere. I submit that kind of chart shows nothing as to first-run distribution.

James D. Miller—By Defendant—Direct

Mr. Whittlesey: May I ask the witness another question?

Direct Examination resumed by Mr. Whittlesey:

Q. Mr. Miller, I gather that what you have done here is to take the first-run exhibition in point of time of each one of these pictures in each of these cities, where the Government asked us to give information as to the theatres in which the pictures were first played? A. That is correct.

Q. And then having gotten that, and the name of the theatre in which the picture first played in the town, you have worked from there on the basis of these theatre lists which we have shown the Government here and divided that as between independent and affiliated theatres, is that correct? A. That is correct.

Q. So this is a division on first exhibitions of all product (2426)

as shown in our answers to Government's interrogatories in these 92 cities as between these various classes of theatres? A. Yes.

Mr. Wright: I might add, if the Court please, that our request was misstated inadvertently by Mr. Whittlesey. We did not ask for this data as to the first exhibitions of all product. We asked for a statement of the regular first-run accounts who had their product during that season. Instead of confining their answers to the regular first-run accounts, who played the regular first-run of their product, they added these other theatres which played any picture, or some of their pictures, for the first time in the town, which pictures haven't actually gotten an exhibition in any first-run theatre anywhere anytime.

Mr. Whittlesey: In other words, you don't dispute, Mr. Wright, that those show first showing of those pictures in each of those towns, correct?

Colloquy

Mr. Wright: Why, no.

Mr. Whittlesey: It does show that, doesn't it?

Mr. Wright: Yes. I simply submit that has no meaning.

Mr. Whittlesey: I don't think that goes to the accuracy of the chart.

Judge Bright: The chart may be wrong then in calling it a first-run chart.

(2427)

Mr. Whittlesey: Your Honor—

Judge Bright: Call it a first exhibition chart.

Mr. Whittlesey: (Continuing.) —we can call it first exhibition chart. It certainly has been brought out here. Of course, we have no clear definition in this case as to just what is first-run or what is a first-run theatre beyond the time at which a given theatre is playing a picture in relation to the other theatres in that town. That at least is something that is perfectly clear and beyond argument. If the picture played first in New York at such and such theatre, that was certainly its first-run. The theatre in which it may have played may not have been what Mr. Wright would call, or somebody else would not agree or would agree was what was commonly called a first-run theatre, but if we get into dispute as to whether this house, that house or another house is to be called a first-run theatre, I think the length of this case would be vastly stretched out. We have to go by something definite in point of time, at least.

Mr. Wright: We were given by one of the defendants a list of what theatres purported to be the first-run theatres in these towns and, as I understood, the definition which was subscribed to by that defendant—Mr. Davis's clients, I believe, is the house that plays a regular run of somebody's pictures

Colloquy.

(2428)

on first-run clearance; that is, where it has clearance over the other theatres in the town and actually controlled these subsequent exhibitions of the film in the town. Obviously, a theatre which merely exhibits a film for the first time in the town without any first-run clearance, which happens to be some 15 or 25-cent subsequent-run house, simply has the film first run because nobody else wants it, no first-run house wants to play it. That throwing of exhibitions of that kind into what it purports to show, first-run distribution of features, is inexcusably misleading.

Mr. Whittlesey: You see, your Honor, we are getting into this dispute as to what is a first-run theatre. I suggest, to meet the suggestion made by Judge Bright that, to eliminate that dispute here and get ourselves clean down to the question of time, that we leave out the word "run" here and call it "first exhibitions." That certainly would be in line with the witness's testimony, and I think that would eliminate the objection you have, Mr. Wright, would it not?

Judge Hand: Well, he would then say it had nothing to do with the case.

Mr. Wright: Precisely.

Mr. Whittlesey: He has not made that argument.

Judge Hand: And that he never made any such (2429)

contention, and so on.

Mr. Wright: We have never contended that pictures which are not good enough for an affiliated—

Judge Hand: You make no claim such as this is introduced to meet?

Mr. Wright: Precisely.

Judge Hand: I do not believe he does.

Colloquy

Mr. Whittlesey: I think it does. We are trying to show, at least to the extent that he charges here that by conspiracy we are depriving independent exhibitors of access to our pictures—now, we are meeting that, first, by showing the extent to which we are giving our pictures for first showings to affiliated theatres on the one hand and independent theatres on the other. Now, Mr. Wright is coming back, without naming any theatre, without putting in any evidence—of course, he could put in evidence to contradict this chart if he wanted—and saying, “I believe in here there are some theatres that I would not call first-run theatres.” It seems to me that is the thing for him to do, to put in evidence, if he wishes to attack this chart, but on the face of it, it is exactly what it states.

Judge Hand: But he has, by cross-examination of your witness, shown a lot of theatres here that do not come up; I should say, to any definition that has been given or any charge that has been made.

(2430)

Mr. Whittlesey: I think he has, with all due respect, I think he has indicated that in his opinion certain theatres are not first-run theatres, but he has offered no proof of that.

Judge Hand: I did not know but that anybody had a different opinion.

Mr. Whittlesey: We are simply showing the theatres in which these pictures first appeared in the town with respect to which Mr. Wright's inquiry has been directed. It is a clear fact.

Mr. Seymour: We are missing Mr. Whittlesey's words over here.

Mr. Whittlesey: Your Honor, I will go on to another chart. I think all that line of Mr. Wright's objection can be met.

James D. Miller—By Defendant—Direct

By Mr. Whittlesey:

Q. Mr. Miller, did you make a study of RKO's answers to the Government's interrogatories covering first-run exhibitions of RKO's first block of pictures of the 1943-44 season in all cities having a population of 25,000 or more? A. I did.

Q. Was this analysis along the same lines as that which you have just described in connection with the first-run distribution (2431)

of RKO's product as shown in its answers to the requests to admit facts? A. Yes, except that in this instance we made a separate analysis for each one of the first-run distributions of the five pictures in the block.

Q. For the purposes of this analysis did you exclude exhibitions in theatres operated by RKO? A. Yes.

Q. Was that for the same reasons as you have given with respect to this analysis of the 92 cities? A. Yes.

Q. Again, did you prepare this analysis in two ways, first, in which you included in your classification of unaffiliated theatres those in which one or more of the defendants had less than a controlling interest, and, second, in which you took exhibitions in theatres in which one or more defendants had more than a controlling interest; or, take it the other way, in which you took those situations where the defendants had less than a controlling interest and included it with the theatres in which defendants had more than a 50 per cent interest, or one or more defendants? A. Yes.

Q. Will you tell us what your analysis shows as to the whole block of these five pictures on both of these two bases. A. On the first basis, that is, the one in which we treat the theatres in which one or more of the defendants had less than—had an interest aggregating less than 50 per cent as unaffiliated, on that basis about 52½ per cent of the exhibitions (2432)

were in affiliated theatres and 47½ per cent in un-

James D. Miller—By Defendant—Direct

affiliated theatres. On the second basis, that is, employing the Government basis of affiliation, that is, treating any theatre in which any defendant had any interest whatever as being affiliated, we find that 62 per cent of the exhibitions were in affiliated theatres and 38 per cent in unaffiliated theatres.

Q: I believe you stated that you took this analysis and broke it up on a picture by picture basis for each picture in the block, is that correct? A. That is correct, yes.

(Marked Defendant RKO's Exhibits RKO-13 and RKO-14 for identification.)

Q. Mr. Miller, I ask you whether these two tables marked Exhibits 13 and 14 for identification show on a picture by picture basis the distribution of the pictures in this block and the distribution of the whole block overall in accordance with the figures which you just testified to? A. They do.

Q. Will you describe those charts a little bit more in detail.

Judge Hand: Are the things you describe in this table I as first-run—does that mean the first showing in each theatre whether it was a first-run theatre or not?

Mr. Whittlesey: In answer to that, your Honor, I think we can state this, that the Government in (2433)

addressing these interrogatories to us, in the case of the interrogatories stated that, for first-run, we were to show the first exhibition. In other words, there is no question that that was the definition of first-run for the purposes of the answers to the interrogatories, which are quite different from the request to admit facts.

Mr. Wright: This interrogatory that he is dealing with here, interrogatory 6, asked each defendant to list

Colloquy

the pictures in the first block for the 1943 season, with the name of the first-run exhibitor who played them and the names of the theatres that played them and a statement of the clearance that the theatre carried. Now, as I recall the answers, in some cases, the block was split because the first-run theatre would only play the better pictures in the block, and then the same thing happened as to the poorer theatres as happened to some of those listed in the admissions of fact, they would go into what is known as a slough house, and it will appear in the answer, of course, that in those cases they did not have first-run clearance, although they did get their initial exhibition in some other theatre, and you have the same——

Mr. Seymour: You are losing part of your audience, Mr. Wright.

Mr. Wright: (Continuing) —you have the same problem here that you have in connection with the admission of facts. If you want to get a picture of the

2434) actual first-run theatres which played these pictures, you have to examine the answer as to the clearance in which they played in the particular theatres which played the particular picture.

Mr. Leisure: If your Honors please, it seems to me Mr. Wright is being unnecessarily technical here. I think it must be clear to the Court that in any given situation in any city in the United States that the first time our picture plays, that is the first-run. I do not see why we should quibble about the use of a term of that kind. We have dealt on that basis with our interrogatories. It has been perfectly clear up to now. I don't see why we should quibble about it.

Mr. Whittlesey: I might add, your Honor, that all the Government requested us to do was furnish it the

Colloquy

first showing of each one of these pictures in each one of these towns all over the country, which is exactly what we have done.

I offer these two tables in evidence as Exhibits 13 and 14.

Judge Bright: How are they marked?

Mr. Whittlesey: 13 and 14.

Judge Bright: Table II is RKO 14?

Mr. Whittlesey: That is correct.

Judge Hand: I think we will admit both of these
(2434a)

things. I am not at all sure whether you are engaged in shadow boxing or what at the present time. I don't understand myself the definition of first-run, you are not agreed on it, or the complaint of the Government of your conduct.

(2435)

Mr. Whittlesey: Perhaps, your Honor, if the Government had given us—

Judge Hand: That is pretty bad after these days of trial. That is a fact; and it is an irritating fact, too.

Mr. Wright: If the Court please, we do not claim that in any event where an unaffiliated theatre does not want to exhibit one of these people's pictures or any other pictures first-run, that the picture is not made available to somebody for exhibition in the town. There is no suggestion in anything we have said in the complaint to that effect. I say now there is no dispute about that whatsoever. The thing, however, that determines whether or not a theatre can operate as a first-run theatre in a town depends, of course, on access to the choice product of some distributor and not simply the privilege of exhibiting such pictures as a first-run exhibitor rejects. That is the rea-

James D. Miller—By Defendant—Direct

son why the distinction that I have been urging here is important as between mere initial exhibition of a theatre somewhere in the town and exhibition in an established first-run theatre.

Judge Hand: Proceed with this witness. I understood that you were going to be through; that it was a short witness, and that the evidence of Mr. Leisure would last a day. It has now lasted two days.

Mr. Whittlesey: Your Honor, before I do may I
(2436)

call your attention to one further point on this definition of first-run? Let us take the amended and supplemental complaint itself. First-run is defined as follows:

"The first exhibition of a motion picture in a given zone after national release."

Mr. Wright: Will you read the definition of first-run theatre that is in there?

By Mr. Whittlesey:

Q. Mr. Miller, I show you a chart and ask you if that also reflects the figures which you just testified with respect to the distribution of that first block in the 415 cities? A. It does.

Q. In other words, that states in summary form the summaries in these two tables, Exhibits 13 and 14 in evidence? A. It does.

Mr. Whittlesey: I would like to have that marked for identification.

Judge Bright: These Exhibits 12, 13 and 14 are in evidence now?

Mr. Whittlesey: That is what I understood.

The Clerk: Except 12, sir.

Judge Bright: Judge Hand has admitted 12, too.

James D. Miller—By Defendant—Direct

(Defendant RKO's Exhibit 12 for identification received in evidence.)

Mr. Whittlesey: This will be marked 15.

(2437)

(Marked Defendant RKO's Exhibit 15 for identification.)

Mr. Whittlesey: I offer RKO's Exhibit 15 for identification in evidence.):

Judge Hand: All right.

(Defendant RKO's Exhibit 15 for identification received in evidence.)

Q. Now, Mr. Miller, did you make any study to show the comparative film rentals received by RKO on its first block of pictures in the 1943-44 season from theatres which you classified as affiliated on the one hand and theatres which you classified as independent on the other? A. Yes, I did.

Q. Did you make this study on the basis of first-run film rentals in the 92 cities of over 100,000 population? A. Yes.

Q. Where did you obtain the data for the film rentals on these pictures? A. From the home office records and exchange records.

Q. And are those records presently available here in New York? A. They are.

Q. Now again, in making this study, did you eliminate rentals from theatres operated by RKO itself? A. Yes.

Q. What was the purpose of making that elimination? A. We eliminated those in order to obtain a more accurate (2438)

measure of the comparative desirability from a film rental standpoint of first-run exhibition in affiliated theatres other than RKO's own theatres with first-run exhibition in unaffiliated theatres.

James D. Miller—By Defendant—Direct

Q. And when you are speaking of first-run, you are speaking of first exhibition as shown on the company's records, is that correct? A. Yes.

Q. Now, what did your analysis show with respect to these comparative rentals in these cities? A. It showed that the first-run exhibitions in the 92 cities of over 100,000 population on this first block of pictures in the 1943-44 season yielded an average of \$1,558.87 per exhibition. And the independent exhibitions yielded an average of \$1,221.41 per exhibition.

Q. Now, on these figures, were you characterizing as affiliated theatres only those in which the defendants other than RKO had an interest of 50 per cent or more? A. Yes.

Q. Now, taking the Government's basis in which you include as affiliated those in which the defendants, one or more, had an interest of any sort, how did your figures work out? A. That computation shows a slightly lower yield per exhibition. That is \$1,528.03 for affiliated theatres and \$1,195.37 for the unaffiliated theatres.

Q. Now in working up these figures, did you find it necessary (2439),
 necessary to eliminate certain exhibitions? A. Yes, we did.

Q. What were those? A. Those were the exhibitions in which the rental was part of the lump sum, or was determined on a national gross basis.

Q. Why did you have to eliminate those in making these studies of comparative film rentals? A. Because there is no way to allocate a specific amount of rental to a specific exhibition in those two instances.

Q. Now did you find this type of contract to which you have just referred was made by RKO with affiliated theatres as well as unaffiliated theatres, or with both kinds? A. Well, that would be true of the lump sum contracts, but there was only one national gross deal and that was with an unaffiliated theatre, the Tivoli in New Orleans, La.

Q. That is, in this— A. In this particular group.

James D. Miller—By Defendant—Direct

Q. Of the first block in the 92 cities of 100,000 population or more, correct? A. That is correct.

Q. So I gather your study here was limited to those cases only where you could attribute a specific film rental to a specific theatre, right? A. That is right.

Q. And you worked your average film rentals from those figures? A. That is right.

Q. Now did you relate these rental figures to the average seating capacities of the respective affiliated and unaffiliated theatres concerned? A. Yes, we did.

(2440)

Q. And what did you find as to the comparative seating capacities in connection with these average rentals? A. We found that the average seating capacity of affiliated theatres—this is exclusive of the RKO theatres—from which the average rentals that I have just testified to were received—the average seating capacity was 1,979 seats, and the average seating capacity of the unaffiliated theatres was 1,605 seats. Now, we made another computation to show what it would be following the Government's basis of affiliation. That is, treating any theatre in which the defendants had any interest whatever, as affiliated, and we found that on that basis the average seating capacity of the affiliated theatres was slightly less. That is, 1,926 seats; and the average seating capacity of the unaffiliated theatres was about the same; that is, 1,607 seats.

Q. Now, how did the relative number of days played work out as between affiliated and unaffiliated theatres on this distribution in the 92 cities on the first block? A. The number of days played was just the same in the affiliated theatres and in the unaffiliated theatres.

Q. In other words, this difference of rental would not be attributable to longer playing time in one type of theatre or the other, is that correct? A. Correct.

James D. Miller—By Defendant—Direct

Q. Now, did you make a similar analysis, Mr. Miller, with respect to all cities with a population of 25,000 or over? A. Yes, we did.

(2441)

Q. And that was just for the first block, is that correct? A. Yes.

Q. And did you set up that information in tabular form with respect to each one of the pictures in that block? A. For each one of the pictures and for the total.

Q. I see. Now I show you two tables, one entitled Table 1 and the other Table 2. Are these the tables of which you spoke? A. They are.

Q. And one is set up on the basis of affiliation where the only affiliated theatres included are those in which the defendants had a 50 per cent interest or more—is that correct? A. That is correct.

Q. And the other in which all degrees of interest were included as affiliated, right? A. That is correct.

(Marked Defendant RKO's Exhibits 16 and 17 for identification.)

Mr. Whittlesey: I offer RKO's Exhibits 16 and 17 for identification in evidence.

Mr. Wright: If the Court please, I have not even yet seen a copy of these last figures that he was testifying to in the 92 cities. I would like to ask him some questions about some of this material, but as to that 92 cities data, they have not even yet supplied me with

(2442)

any copy of the tabulation.

Mr. Whittlesey: No tabulation has been prepared on that. I asked the witness what he has found. Of course he has his own tabulations here and can furnish them to you. But I am not offering those as an exhibit. I am offering the over-all on all of the 415 cities as an exhibit.

Colloquy

Mr. Wright: There is no way we can examine him if we can't at least see what he is testifying from.

Mr. Whittlesey: His records are available and you can examine from those, Mr. Wright.

Judge Bright: What do you contend these Exhibits 16 and 17 show that are material to the issues here?

Mr. Whittlesey: Just this, your Honor: we are here charged with favoring affiliated theatres over independent theatres as the result of a conspiracy. The testimony of our witnesses in this case has been that to the extent that we do show our pictures just alone in affiliated theatres, it is not due to any conspiracy between us and any other defendant, but, rather, due to the fact that we find it better business in terms of dollars and cents; and I believe that Mr. Mochrie testified that by and large he gets better returns from affiliated theatres than from unaffiliated theatres. We are here simply taking the actual record as given to the Government on their request in the

(2443)

form of interrogatories to show in terms of dollars and cents that it works out that way. As a matter of fact all business experience, at least the experience of this company, shows we are getting on a theatre by theatre basis better rentals from affiliated theatres than independent theatres; and that to that extent, tends to offset the charge or to meet the charge that we are favoring affiliated theatres over unaffiliated theatres by virtue of the conspiracy to do so between us and the other defendants.

Mr. Wright: Mr. Whittlesey has again not stated to your Honor correctly what the witness has done here. As to these rental figures that are in these tables that have just been handed me, tables one

James D. Miller—By Defendant—Direct

and two, which I believe are marked RKO's Exhibits 16 and 17, he is dealing with rental figures that were not supplied to the Government at all. The only rental figure that was supplied in the interrogatory answer was the rental received on the one selected picture of Lady Takes a Chance. As to these other figures, they are based on data which has never before been seen by or offered to us.

Mr. Whittlesey: Your Honor, all I can say to that is, of course we can't very well be, in proving our case here, limited simply to those figures which we furnished the Government at its request. The witness has stated the source of the figures which we have been putting in here, which is our own home office

(2444)

and exchange records which are available here for checking at any time. We naturally—

Judge Hand: Well, we will allow them.

(Defendant RKO's Exhibits 16 and 17 for identification received in evidence.)

Q. Now, the Government in its trial brief here charges that RKO employs percentage contracts in licensing theatres affiliated with other defendants as a form of profit-sharing between it and other defendants. Are you familiar with those charges, Mr. Miller? A. I am.

Q. Have you made any analysis to determine to what extent RKO uses percentage contracts in dealing with affiliated theatres? A. Yes, I did.

Q. And again, was this analysis based on RKO's answers to the Government's interrogatories covering the first run exhibition of its first block of '43-44 product in cities of 25,000 population and over? A. Yes.

Q. Now, where did you get the information with respect to the type of contract used in these first-run exhibitions? A. From the exchange and home office records.

James D. Miller—By Defendant—Direct

Q. And, again, those are available here in New York?

A. They are.

(2445)

Q. Now what did your analysis show with respect to the use of percentage contracts on this first block of pictures as between affiliated and unaffiliated theatres? And I think for simplicity, if you will limit yourself to what we call the controlled basis of affiliation—that is, where we are classified as affiliated, or you classified as affiliated theatres in which there is an interest of 50 per cent or more— A. On that basis, the whole block of five pictures, about 43 per cent of the first-run exhibition played in affiliated houses on a percentage basis, and about 39 per cent played in unaffiliated theatres on a percentage basis.

Q. Now, did you make a further study to break that down to the case of where the percentage contract was what was testified to here this afternoon by Mr. Mochrie as a percentage to a split? A. Yes, we did.

Q. And, again, did you distribute the use of that type of contract as between affiliated and unaffiliated theatres in these cities? A. Yes, we did.

Q. And what did your figures show there? A. Well, in each instance the number of exhibitions played on that basis was slightly under 6 per cent in both the affiliated theatres and the unaffiliated theatres.

Q. In other words, there is very little difference between either? A. Very little difference.

(2446)

Mr. Davis: What per cent did he name?

The Witness: Slightly under six per cent.

Q. That is, of course, the average for the whole block?

A. Yes.

Mr. Wright: Is he testifying to figures that are on these things that they are offering in evidence?

James D. Miller—By Defendant—Direct

Mr. Whittlesey: He is, Mr. Wright. I have not offered them. I would like to ask him a few more questions.

By Mr. Whittlesey:

Q. Now, did you work out these figures again on the Government's basis of affiliation, that basis upon which in any theatre in which any defendant has any interest is classified as affiliated? A. I did.

Q. And did you work these figures out on the basis of each one of the pictures in the block as well as the whole block? A. Yes.

Q. The figures as to which you have just testified were the average for the whole block, is that right? A. That is right.

Q. When you say you broke it down for the various pictures on these two bases, is that set forth on these sheets marked Table 1 and Table 2? A. Yes.

Mr. Whittlesey: I would like to have these marked for identification.

(Marked Defendant RKO's Exhibits 18 and 19 for identification.)

(2447)

Q. Now I wish, Mr. Miller, you would take this Table 1 and briefly tell us how these figures operate and what is shown, if you will take one of the pictures first. A. Table 1 is on the basis, on our basis of affiliation. That is including as affiliated theatres only those in which one or more defendants other than RKO had an interest of 50 per cent or more. I will select the picture that had the widest distribution in the block. That is Lady Takes a Chance. There are two columns for that picture. The first one shows the exhibitions in the affiliated theatres, and the second column shows the exhibitions in the unaffiliated theatres..

James D. Miller—By Defendant—Direct

Q. That is the total exhibitions, regardless of what the type of contract was used in each class of theatre, right?

A. That is on the first-run.

Q. Right. A. The first line shows that there were 236 exhibitions in affiliated theatres and 195 in unaffiliated theatres of *Lady Takes a Chance*.

Q. All right. A. Now then, below that, we show how many of these exhibitions were on a flat basis. They were relatively small for this picture. They were slightly less than 13 per cent for affiliated theatres and slightly over 16 per cent for unaffiliated theatres.

Q. Now your next line deals with the number of these (2448) pictures in terms of percentage which were licensed on a percentage basis of any kind, right? A. Yes.

Q. And what does that show? A. That shows that over 87 per cent of the exhibitions were on a percentage basis—

Q. To affiliated theatres? A. In affiliated theatres, and about 83½ per cent of the exhibitions in unaffiliated theatres.

Q. Now let us take the percentages to a split type of contract—

Judge Bright: Can't we read this? Why waste the time of the Court?

Mr. Whittlesey: I am perfectly willing to offer them.

Judge Hand: This was to be a short witness. It is now two hours and a half.

Mr. Whittlesey: I can say this, your Honor, I am practically through with him except for one more set of charts.

I should like to offer those exhibits in evidence.

(Defendant RKO's Exhibits 18 and 19 for identification received in evidence.)

James D. Miller—By Defendant—Direct

Q. Now, Mr. Miller, the Government has also stated in its trial brief here that the defendants have imposed high minimum admission price restrictions on unaffiliated subsequent run theatres so as to siphon off the admission price (2449)

dollar into affiliated first-run theatres. Are you familiar with that charge? A. Yes.

Q. And have you made any analysis of RKO's answers to the Government's interrogatories in the light of that charge?

A. Yes, I have.

Q. What sort of an analysis did you make? A. We selected the picture, Lady Takes a Chance, and we analyzed the contracts to ascertain just what minimum admission price requirements appeared on those contracts, and in doing so we took those exhibitions in which the subsequent run was in an unaffiliated theatre following a first-run exhibition in an affiliated theatre. And in doing this we limited it to those cities of 50,000 population and over; there happened to be 62 such cities—

Q. That was because the Government's interrogatories, so far as any run after first was concerned, started only with those cities of 50,000 or more, isn't that right? A. That is right.

Q. So you took each situation on these answers for this picture in which the subsequent run was an independent theatre and the prior run had been an affiliated theatre, correct? A. That is right.

Q. And what did your analysis show as to the minimum admission prices, if you can tell us briefly on that? A. Well, there were 470 such exhibitions, and more than half of those (2450)

had a minimum admission price of 15 cents or less. There were only 8 that were over 40 cents.

Q. Now, to save time, Mr. Miller, I might ask you, did you prepare a table breaking down the use of these minimum

James D. Miller—By Defendant—Direct

admission prices, and also set forth those figures in graphic form? A. I did.

Q. Is this the table? A. Yes.

Q. And is that graph the graph to which you refer? A. That is correct.

Mr. Whittlesey: I would like to have those marked for identification as RKO's Exhibits 20 and 21.

(Marked Defendant RKO's Exhibits 20 and 21 for identification.)

Mr. Whittlesey: I offer those in evidence.

Q. Now, Mr. Miller, did you prepare one final computation in which you took first-run in an independent theatre and subsequent runs also in an independent theatre and make a study to determine the use of minimum admission prices in that situation where both theatres were independent? A. Yes, we did.

Q. And did you set up your findings there also in the form of a table and a graph? A. I did.

Q. I ask you whether this table and this graph set forth your findings? A. Yes, they do.

Mr. Whittlesey: Will you mark these?

(2451)

(Marked Defendant RKO's Exhibits 22 and 23 for identification.)

Mr. Davis: May we have the question read?

(Question referred to read.)

Mr. Davis: Now may I inquire what is meant by the use of minimum admission prices in that question?

Mr. Whittlesey: I think I can clear that up for you, Mr. Davis?

James D. Miller—By Defendant—Direct

Judge Hand: Speak up.

Mr. Whittlesey: Excuse me, your Honor.

Q. The price to which you refer here as a minimum admission price appeared in the exhibition contracts in question, did it not? A. Yes, it did.

Q. Was it the price filled in in the blank space on the contract? A. Yes.

Mr. Whittlesey: Does that answer your question?

Mr. Davis: I do not quite understand yet. You are asking on the basis of the minimum admission price, you are asking him to make some comparison between an independent first-run and an independent subsequent run. But what the comparison is you are making, I do not understand.

The Witness: It is a comparison of exhibitions in the affiliated theatres as compared with unaffiliated theatres. That is what the contracts show with respect to those different types of exhibition.

(2452)

Mr. Davis: Is it the number of contracts? Is it revenue derived?

The Witness: It is the number, the number of exhibitions.

Mr. Whittlesey: I offer RKO's Exhibit 20, 21, 22 and 23 in evidence.

(Defendant RKO's Exhibits 20, 21, 22 and 23 for identification received in evidence.)

Mr. Whittlesey: That is all.

Mr. Wright: It the Court please, there are a great many questions that I have about these exhibits, but I think they can best be answered outside of court, if it

James D. Miller—By Defendant—Direct

is understood that we can recall him if we can't straighten out these things.

Judge Hand: We will make the ruling that they are admitted subject to correction.

Mr. Wright: There is just one thing.

Cross Examination by Mr. Wright:

Q. I think you gave some figures there for which there was no tabulation. Could we have a copy of whatever you testified from as to the 92 cities? You gave some percentages and I believe there was no tabulation offered in evidence which contained them. Can you give us a copy of the sheet that you were testifying from? A. That was from my working papers, but I can give you a copy or a digest of that.
(2453)

Mr. Wright: All right.

Mr. Rafferty: It is also understood that they are admitted subject to any other objection any other distributor may have?

Judge Hand: They are admitted subject to correction.

Mr. Rafferty: We are going to object generally there in addition.

Judge Hand: All right, you may do so.

Mr. Leisure: That is all, Mr. Miller.

(Witness excused.)

Mr. Leisure: We have an affidavit. With the Court's permission I will simply have it incorporated into the record in order to save time. That is all.

Koerner

(2454)

(The stipulation referred to is as follows:)

"STIPULATION

"The undersigned hereby stipulate that Charles W. Koerner, if called to the witness stand, would testify as set forth in the attached affidavit, identified as Appendix A and the several exhibits attached thereto, identified as Koerner Exhibits 1 to 4, inclusive. Date: New York, N. Y., October 26, 1945.

(Sgd) Robert L. Wright,
Robert L. Wright,
Attorney for Plaintiff.

(Sgd) George S. Leisure,
George S. Leisure.

(Sgd) Donovan, Leisure, Newton & Lumbard,
Attorneys for Radio-Keith-Orpheum
Corporation, RKO-Radio Pictures,
Inc., Keith-Albee-Orpheum Corpora-
tion, RKO-Proctor Corporation and
RKO-Midwest Corporation.

"AFFIDAVIT OF CHARLES W. KOERNER

STATE OF NEW YORK, }
COUNTY OF NEW YORK } ss.:

"CHARLES W. KOERNER, being duly sworn, deposes and says:

"My name is Charles W. Koerner. I reside in Los Angeles, California, and am presently the vice-president in charge of production of RKO Radio Pictures, Inc., with

Koertner

(2455)

headquarters in Los Angeles. Except for two years service during the first World War I have been in the motion picture business since 1915. From about 1919 to 1926 I was employed in the distribution of motion pictures, first for Universal and later for First National Pictures. Then I was employed in theatre operations from 1926 to 1931 by George Mann Theatres in San Francisco and from 1931 to 1942 by RKO. Since 1942 I have had my present position with RKO Radio Pictures, Inc.

"As vice-president in charge of production of RKO Radio Pictures, Inc., I determine our policies with respect to production and am in charge of the entire production activities of RKO Radio Pictures, Inc. The great majority of our productions are made at the main studio in Hollywood, which has 14 stages. In the Hollywood studio are located our executive offices, as well as the various departments necessary to conduct our production activities. These departments include departments for stories, scenarios, casting, research, architectural designing, dress designing, wardrobe, make-up, photography, sound, music, retarding, dubbing and publicity, as well as the usual executive, accounting, budget, supply, transportation and legal departments. There are also a number of others which I have not enumerated.

"RKO's other studio, the RKO-Pathe studio located at (2456)

Culver City, has less stage space but more area than the Hollywood studio and in which there are standing permanent sets which are used for outdoor scenes. In addition, we have in the San Fernando Valley a ranch of approximately 160 acres. There we also have standing sets such as western street scenes, small villages, etc.

"Competition in the field of production begins with the acquisition of story material. Let us take, for example, the competition between producing companies for story material

Koerner

which can be utilized in the making of successful motion pictures. In order to explore and discover the kind of stories which lend themselves to successful pictures, RKO maintains both in its home office in New York and in the studio story departments whose function it is to obtain and review all story and dramatic material and to make recommendations concerning their acquisition to us. Such story departments are also maintained by our competitors in the continuous and aggressive search for suitable story material. It has been the experience of all motion picture producing companies that the type of story that carries the greatest appeal with the public is one based either upon a best selling book or upon a successful play. As the result of the keen competitive bidding for this kind of story the price ultimately paid by the successful bidder is very substantial. We have (2457)

recently completed a deal for the motion picture rights to *So Well Remembered*. James Hilton's recent novel, at a cost of approximately \$300,000. I recall no best seller or successful play suitable for motion pictures which has not had the interest of two or more production companies.

"There is also competition for the services of stars and feature players. RKO maintains a constant search for new talent. We have a staff for this purpose with offices in New York and Hollywood. It is their duty to attend shows, be in contact with all agents and visit little theatres, summer stock companies, night clubs and other places where talent may be uncovered. We have expended over a period of the last five years several million dollars in getting such potential stars or feature players under contract and attempting to develop them into established motion picture personalities. During this period in spite of this large expenditure, we have succeeded in developing only two or three important players.

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"There is also competition for every other type of creative personality in Hollywood, including directors, writers, cameramen, composers, musical directors, sound technicians, set designers, decorators, and dress designers.
(2458)

"We have three types of contract which we make with stars, feature players, directors, producers and other production personnel. The first type is the single picture contract under which the personality agrees to make one picture for RKO. The second general type is the multiple picture contract which may take either of two forms: A contract for two pictures to be produced within one year, or a contract for one or more pictures per year for two or more years. Usually these multiple picture contracts do not fully cover the personality's time and he or she is, therefore, free to make additional pictures for other producing companies when he or she is not working for RKO. Finally, we have term contracts which call for the personality's exclusive services for a fixed period. The multiple picture contract calling for one picture a year is the type most frequently used by RKO when contracting important personalities. The single feature contract is most frequently used by RKO in contracting with other players and with other producing personnel. We do not have any term contract with any player or producer of first importance. The only term contract we have with directors of such importance are two in number. We have only one term contract with a writer of first importance. The total roster of the players under term contract to RKO numbers 35 males and 15 females players.
(2459)

"To supplement the production personnel which is under term contract to RKO, we have found it necessary to secure additional personalities through multiple pictures or single picture contracts with personalities in the free lance market, through the borrowing of personalities under contract to

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other producing companies, and through the making of arrangements with other producing companies to share contracts for the services of personalities.

"A free lance player, writer, director, or other personality is a person who is not under a term contract to a producing company, but contracts from time to time with producing companies to participate in the making of a particular picture or pictures. RKO for many years has drawn heavily upon the free lance market in order to meet its production requirements. There are a substantial number of important personalities who are on the free lance market and in fact this market has shown a steady growth. The reason for this growth is that important artists are in demand at all times and do not need the security of a term contract. The personality is in a much better position to obtain a greater compensation for his or her services. It is not unusual for an important personality to receive \$150,000 to appear in a single picture. We have paid this amount to Miss Rosalind Russell and there are many other who can (2460)

and do command extremely high compensation for an appearance in a single picture. An additional advantage to the artist in being a so-called free lance is the freedom involved. The personality can choose the kind and number of pictures which he or she desires to make. The artist can also demand and await the availability of certain directors, motion picture and still cameramen and other production personnel which the personality considers will contribute to the success of the personality's performance and that of the picture. With the competition of producing companies for the services of personalities, established personalities may go into the free lance market with the assurance that there will be continuous bidding for their services on very favorable terms.

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"There are no precise statistics of the number of players, writers, and directors available in the free lance market, but there are statistics on the number of established personalities in the motion picture field and the number who are under exclusive contract to RKO, Fox, Loew's, Columbia, Paramount, Warner's and Universal. Therefore, the difference will represent the number of players, writers and directors who are either free lance or are under contract to producing companies not defendants in this action.

"Virtually all established adult screen players over 18 (2461)

years of age are 'A' members of the Screen Actors' Guild. There were 2,109 in number as of September 21, 1945. Of this total, 1,844 were not under term contract as of October 1, 1945 to either RKO, Fox, Loew's, Columbia, Paramount, Warner or Universal. Of this 2,109, 1054 players were entitled to star or feature billing; and of the 1054 stars and feature players only 261 were under term contract to any of the above producing companies.

"Similar figures are available with respect to writers. Virtually all established screen writers are 'Active Members' of the Screen Writers' Guild. As of September 22, 1945 of the 952 Active Members of the Screen Writers' Guild, only 174 were under term contract to the seven companies which I have designated above.

"Similar figures are also available on directors. Virtually all established directors are 'Senior Director Members' of the Screen Directors' Guild. As of October 1, 1945 of the 222 feature motion picture Senior Director Members of the Screen Directors' Guild only 75 were under term contracts with the above designated companies.

"To supplement the personalities we have under contract we also, from time to time, contract for the loan of certain stars, feature players and other important production personnel. Such borrowings are also necessary where the proposed picture requires a particular personality or special

(2462)

talent which we do not have under contract or are unable to obtain in the free lance market, whereas some other studio might have a personality under contract who would be especially appropriate. Attached hereto as Koerner Exhibit 1 is a list of the borrowings by RKO since 1940. The fact that a producer from whom we borrow is a so-called major producer, or a so-called independent producer, does not constitute a factor in determining whether or not or from whom we shall borrow. Reference to this exhibit will show the fact that 62 loans have been made to RKO by major producers and 29 loans by independent producing companies from 1940 to 1945, but the loans which we have negotiated from independent producing companies have brought to us a substantial number of more important players for our top flight pictures. As for example: During the last year we borrowed from Selznick, whose company's name is Vonguard, Dorothy McGuire, the female star, and John Cromwell, director, in making the picture entitled 'The Enchanted Cottage', one of our most important productions. We are nearing completion of a picture entitled 'From This Day Forward' with Joan Fontaine as the female star, whom we borrowed from Selznick. We have just completed another important picture 'The Spiral Staircase' and to make this picture we borrowed from Selznick Ethel Barry-

(2463)

more and Dorothy McGuire, the female stars, Robert Siodmak, the director, Dore Schary, the producer, and Ronda Fleming, a featured player. We have started to shoot another of our top flight pictures entitled 'Notorious'. For this picture we borrowed from Selznick Ingrid Bergman the female star, and Alfred Hitchcock, the director. We have commenced another picture entitled 'They Dream Of Home', for which we borrowed again Dorothy McGuire and Dore Schary to produce. For another picture entitled 'All Kneeling' we borrowed from Selznick Alan Marshall for the male lead and Joan Fontaine for the female lead.

Koerner

"Other producing companies from time to time have the same need for borrowing personalities as does RKO. Accordingly, we have had occasion to contract with other producers for the loan out of personalities under contract to RKO. When we receive a request for a contract for the loan out of a personality under contract to us, a very important factor in determining our action on the request, is whether the story or part is suitable for the personality and whether the personality wishes to be loaned. His value to us can be maintained and enhanced only if he is used in a proper part, in a suitable story, in a good production. Other factors considered include the ability of the borrower to pay a proper price for the loan out and his reputation for making good (2464)

pictures. In determining whether we will make a loan out each deal stands upon its own merits and we do not consider as factors whether the producer requesting the loan out has made or may make loans to RKO, nor whether the producer's pictures are regularly exhibited in RKO theatres nor whether the borrowing producer is a major producing company or an independent producing company. The compensation to be received for loaning out a personality is not fixed by any formula, but by individual negotiation. The valuation is governed in the main by RKO's opinion as to the box office value of the person RKO is lending. This varies depending on the particular personality, but in any event RKO tries to obtain as favorable terms as possible when it loans out a personality and usually loans at a profit. RKO's determination of the price to be charged for a loan out is not affected by the fact that the producer is a major or an independent producing company. Attached hereto is Koerner's Exhibit 2, which is a schedule of the loan outs made by RKO to others of personalities from 1940 to 1945. This exhibit shows that during this period RKO has made 30 loan outs to major producing companies and 28 loan outs to independent producing companies.

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"Also to supplement our available talent, we have made arrangements to share the services of certain players with (2465)

other producing companies, which arrangements are generally called talent sharing arrangements. A talent sharing arrangement comes about when one producing company which has the contract for the services of the particular personality feels that it cannot advantageously utilize the full services of this personality and is willing to permit another producing company desiring to utilize the services of that personality to participate in the contract. Attached hereto as Koerner Exhibit 3 is a schedule of the talent sharing arrangements in which RKO has participated during the past five years. In entering into such arrangements it is immaterial whether the other participant is a major producing company or an independent producing company, and, as the schedule shows, 12 of the 21 arrangements which RKO has made have been with independent producing companies. Furthermore, as the schedule shows, in 7 of these 12 arrangements the independent producing company had the contract originally for the services of the personality.

"In addition to making such personalities as we have under contract available to other producers on loan outs, we also make available to them studio space and sets which are not being used by us. In fact, production facilities and equipment of the RKO Pathe Studio at Culver City are almost constantly under lease to outside producers. Pres- (2466)

ently these facilities are being used by Sol Lesser, Edward Small and David Selznick, independent producers. When we have such space available we are prepared to lease it at a fixed rental to anyone who is able to pay that particular price, and in determining whether or not to make such a lease it is immaterial whether the lessee is a major producing company or an independent producing company. Attached hereto as

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Koerner Exhibit 4 is a schedule of the leases of stage space and sets at the RKO main studio and ranch during the period January 1, 1939 to September 23, 1943. The record for the years given is typical and the pattern indicated thereby has continued. As the exhibit shows clearly the majority of these leases were to producing companies other than major producing companies.

"In addition to leasing studio space we frequently make contractual arrangements under which we lend out camera, sound and electrical equipment belong to RKO. In making these arrangements it is immaterial to us whether the other party to the contract is a major producing company or an independent producing company. During the period from January, 1938 to December 18, 1943 we made a total of 314 such rental agreements, of which 150 were major producing companies and 164 to independent producing companies. The record for these years is also typical and the (2467) pattern has continued.

"Due to disturbed conditions at our studios we have been unable to prepare a schedule of the leasing by RKO of production facilities and equipment of the RKO Pathe Studio during the last five years, and for the same reason have been unable to furnish recent detailed information concerning the leasing by RKO of stage space and sets at the RKO main studio, and of camera, sound and electrical equipment.

"The charges that RKO has participated in a combination or conspiracy to exclude independent producers from access to production personnel and equipment and that RKO has combined or conspired to monopolize the production of motion pictures are untrue. As a matter of fact, a number of men formerly connected with RKO have become and are now independent producers, including Jules Levy, David Selznick, Leo McCarey, Leo Spitz, Sam Briskin, Eddie Alperson, Eddie Small and Sol Lessor. The independent producers in

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Hollywood have access to all the available stars, feature players and other production personnel in the free lance market and many of them have important personalities under contract to them. Furthermore, many important personalities have contracted with one producing company for their services with respect to one picture a year and are available (2468)

to other producing companies, including independent producers, for the portion of their time not committed under contract. For example, RKO now has contracts with a number of important players for a single picture a year for a varying number of years, including, among others, such players as Ginger Rogers, Cary Grant, John Garfield, Myrna Loy, Paul Lucas, John Wayne, and Randolph Scott. On the average it requires from 10 to 12 weeks to complete the average important picture, thus leaving these personalities with approximately 40 weeks of each year when their services are available to producers other than RKO.

"To the best of my knowledge there is available to independent producing companies adequate studio facilities and equipment for the making of their pictures. I know of no instance where an independent producer or producing company have the ability and the other prerequisites to the production of marketable pictures has failed to secure needed players and other production personnel and studio space and equipment necessary to make its or his picture or has failed to obtain national distribution. RKO has consistently cooperated with capable independent producers in loaning to them personnel and leasing to them space and equipment and in distributing their pictures.

"The integrated organization under which RKO produces, distributes and exhibits its pictures has many important advantages to the production activities of the company which make it the form of organization best adapted (2469)

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to the successful operation of our company. It is highly essential that the studio have the advantage of theatre affiliations so that the proper presentation of its pictures is assured. This security of playing time allows the producing company to take certain risks in making new types of pictures with known personalities in unusual or new types of parts. Similarly, assured of the cooperation of the RKO theatres, we are encouraged to make pictures introducing talented but relatively unknown players, and thus to attempt to broaden the source of public entertainment and to increase the number of available artists. For example, our picture 'Days of Glory' was made with a completely new cast and brought to the screen for the first time Gregory Peck. This picture led to his appearance in 'Keys of the Kingdom' and 'Valley of Decision' and established a new star enjoying great public popularity.

"Another important advantage to the producer from integration of production and exhibition is the greater financial strength of the whole as a result of the stabilizing effect of theatre earnings. Production is the speculative phase of the motion picture industry, for it involves the investment of (2470)

millions of dollars on features representing our judgment as to the box office attractiveness of a story and cast. The fluctuations of our production income are therefore quite substantial. The steady income from our theatres cushions these fluctuations, and tends to make the consolidated earnings of the company more stable.

"Through the RKO affiliated theatres we are assured of not only the prompt exhibition of our pictures but their exploitation in such a manner as to establish their popularity with the public and to assure their success generally. The availability of exhibition in RKO theatres gives us a direct indication as to public tastes and as to the trends in the types of pictures that are receiving public acceptance and

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allows us to adjust our production plans in respect to such trends. Our theatres naturally play a wide variety of pictures, thus giving us a broad basis for judgment as to public trends.

"Each of the accompanying schedules has been prepared from the original books and records of RKO Radio Pictures, Inc. and the information incorporated in such schedules is correct."

(Sgd) CHARLES W. KOERNER."

(2471)

Judge Bright: Is that the end of the RKO case?

Mr. Leisure: We have a stipulation that we are discussing with Mr. Wright, and I think that will end our case.

Mr. Rafferty: We still have to extend the 73 to 92. I have got practically all of it finished. I will have the whole of Universal finished in the morning, and I would like the privilege in the morning of putting in the 73 to 92. We have agreed on practically everything.

Judge Hand: All right.

Mr. Proskauer: Your Honor, we have—I hate to say it—but a few statistics. My charts, though, are going to be animated cartoons. I do not know whether your Honors want to start with them tonight or not. They won't take very long. And then tomorrow Mr. Seymour and I want to offer some evidence with respect to the arbitration awards and system. In addition to that I have a stipulation in Mr. Wright's hands which he has not had an opportunity to clear, but I am sure he will clear it, and I will have a brief statement to read.

Colloquy

Judge Hand: Has Mr. Caskey anything more?

Mr. Pride: We have some stipulations, your Honor, with respect to testimony of some of the National Theatres executives whom we have not called because we believe we can work it out with Mr. Wright. We have discussed it with him and we expect
(2471-A)

to have no further oral testimony along that line.

Judge Hand: I see.

Mr. Pride: I think we will have a few more exhibits.

Judge Hand: Very well. We shall adjourn until tomorrow morning at 10:30.

(Adjourned to November 9, 1945, at 10:30 a.m.)

Colloquy

(2472)

New York, November 9, 1945,
10.30 o'clock a.m.

Trial resumed.

Mr. Leisure: If your Honors please, yesterday, when the witness Mochrie was on the witness stand, Judge Bright asked the witness if he knew of any specific instances in which the RKO clearance varied as to first-run theatres from that of any other defendant and the witness replied he knew there were such instances, but without his records he could not specify them. I intended to have him supply us with a list of such theatres, but I find that that will not be necessary. It is already in the record, Judge Bright, in the 14 cases, appeal court cases, submitted by the Government. At least five of those cases that are in the record show that RKO's clearance varies from one or the other of the other defendants, so it will not be necessary to call anyone on that.

Those are the 14 clearance cases, and if your Honors wish to make a note of it, they are appeal court decisions 12, 24, 52, 104 and 109.

I indicated yesterday that we had some stipulations to take up with Mr. Wright, and there are two of those. I have tables here which I would like to

(2473)

offer in evidence showing, as to the Cincinnati theatres, the size and the data, and they are the same as Mr. Davis offered with respect to New York and the same as we offered with respect to New York. I would like to offer those, and I have taken them up with Mr. Wright, and I believe there will be no objection.

Mr. Wright: We have no objection.

Colloquy

(Marked Defendant RKO's Exhibit 24.)

Mr. Leisure: Also I offer a table showing the theatres operated by RKO, and it gives the state, the location, the theatre, the seating capacity and the acquisition cost and so forth. I have taken that up with Mr. Wright, and I believe there will be no objection to that.

Mr. Wright: Of course, as to this exhibit, it merely duplicates what is already in the record twice as to the theatres they operate. The only thing that this adds to what is previously in there is these acquisition costs, and I believe those are completely immaterial and irrelevant to any issue in the case. I just want to note that objection.

Mr. Leisure: The acquisition costs supplement Mr. Rathvon's testimony. That is why we are offering that.

(Marked Defendant RKO's Exhibit 25.)

Mr. Leisure: That finishes the case for RKO, if the
(2474)
Court, please.

Mr. Proskauer: Your Honors, I offer in evidence this diagram showing the dates of first-run exhibition of Warner's Princess O'Rourke in the 92 cities. That is in line with the other similar things. I do not like to regard Princess O'Rourke as a guinea pig, but this was our guinea pig picture.

I would like to, as I put these in, just briefly call attention to the significance here. This situation arose when there was a suggestion of holding back the pictures from independent distribution. This shows that our first showing was at an independent theatre in Buffalo, 20th Century Theatre in Buffalo. That is the red line. Again, red indicates an independent theatre.

Colloquy

Then, the next day we opened up at our theatre in Philadelphia. Some substantial time later, oh, a couple of weeks later, we opened it at the Strand in New York City, and, meanwhile, it was shown at the Metropolitan Theatre in Boston, at this independent theatre in Dayton, Ohio, at an independent theatre in Indianapolis, and your Honors can see from the coloring the way the independent showings were spaced in with these dark lines which are Warner theatres, and the green lines are affiliated theatres of other companies.

Judge Hand: What was the Boston theatre?

Mr. Proskauer: The Boston theatre is—

(2475)

Judge Hand: I mean, who owns it.

Mr. Proskauer: It shows on here, your Honor. I cannot answer it from memory. It was the Metropolitan Theatre in Boston, and that is an independent theatre and it opened there on the 28th of October, which was about two weeks after the first showing of the picture.

Mr. Seymour: The Metropolitan is an M & P. theatre, Judge Proskauer.

Mr. Proskauer: What does M. & P. mean?

Mr. Seymour: Mullin and Pinanski, which is a Paramount affiliate, if it is the Metropolitan you are talking about.

(2476)

Mr. Proskauer: I made a misstatement about Boston. It was not in that theatre at all. That did not show at the Mullin & Pinanski theatre in Boston until the 15th of December. The line that I should have described there was the State Theatre in Tampa.

Judge Hand: Yes, I think you called it Boston when you started.

Colloquy

Mr. Proskauer: No, that was Buffalo, your Honor.
Judge Bright: The initial showing you said was in Buffalo?

Mr. Proskauer: Yes.

Judge Hand: Oh, yes, the initial showing, but I thought you mentioned Boston.

Mr. Proskauer: No. My eye just did not take the line across. That is Boston (indicating) and it is shown as an affiliated theatre. This line here was an independent theatre, the State Theatre in Tampa.

Judge Hand: What was it?

Mr. Proskauer: The Buffalo theatre was the Twentieth Century, and it has been testified there was no connection with Twentieth Century-Fox.

Judge Hand: Yes, an independent.

(Marked Warner Bros. Exhibit W-2.)

Mr. Proskauer: Now, I offer in evidence a schedule which I am going to use as a basis for other
(2477)

schedules, so I am not going to burden you with very much attention to this schedule as such until I collate it with other schedules. This schedule is the total film rentals paid by Warner Bros. theatres for the years 1931 to 1945 inclusive, and I have said to Mr. Wright that they will all be taken subject to his check. They are taken directly from our books.

(Marked Warner Bros. Exhibit W-3.)

Mr. Proskauer: What I am endeavoring to do, your Honors, is not to burden you with a consideration of a lot of charts until I can show you what I believe to be their real significance.

Your Honors will notice on this chart, however, the variation from year to year in the percentage of our film rentals that we paid to other companies. For

Colloquy

instance, take Paramount. In 1931 we paid them 5.6 per cent of our revenue. In 1932 we paid them 14 per cent. When you get down to 1940 it got back to 11 per cent.

Take Loew's: We paid them 14 per cent in 1931, and it got up to 24 per cent in 1940, and it got back to 16 per cent in 1945.

While these percentages do not show huge variance, that means an enormous variance in money.

Judge Hand: That is, all others are independents?

Mr. Proskauer: All others are what we call the
(2478) independents.

Judge Hand: Now, these are total film rentals for what kind of theatres? All theatres?

Mr. Proskauer: All Warner theatres. These are the film rentals we paid on all runs to the other companies.

Judge Bright: Just on features?

Mr. Proskauer: Oh, no, shorts and everything.

Now, the next chart supplements that by showing the total film rentals received by Warner Bros. for licensing their pictures in the United States and Canada.

(Marked Warner Bros. Exhibit W-4.)

Mr. Proskauer: Just preliminary and not by way of any accentuation, you will notice huge variances there. For example, Loew's paid a percentage in 1931 of about three times what it paid us in 1945.

Mr. Davis: That is Loew's percentage of your total take?

Mr. Proskauer: That is right. There are similar variances all through.

Loew's got down to one-half of one per cent, and in another year they were up to 4.8 per cent; and

Colloquy

there are those variances which I cannot expect the Court to keep in mind but which I will advert to; but I am really offering this, as I said, as a basis for some (2479)

supplemental charts that use both of these as a base.

The next chart I offer is the total film rentals received by Warner Bros. and its subsidiaries from all sources, both domestic and foreign.

(Marked Warner Bros. Exhibit W-5.)

Mr. Proskauer: When I come to brief I am going to ask your Honors to note in that chart the large percentage of our revenue that came from foreign sources, namely, 31.3 per cent for 1944; that we got from the affiliated Big Four, so-called, 19.4 per cent of our rentals. I am going to build up a picture of how deep our financial interest is in doing business with a great mass of independent theatres throughout the country.

Mr. Wright: Just one comment about this exhibit: I take it there is no dispute, is there, that when you go into the foreign field, of course, a substantial portion of your foreign revenue also comes from theatres in which these defendants are also interested—

Mr. Proskauer: I have never heard that and I have not the slightest information on it.

Mr. Wright: Well, you are aware of the fact that the other defendants have theatre interests all over the world?

Mr. Proskauer: Well, I will not make a concession on that, but I will do this with you: We will in the (2480)

interval go over those figures and agree on them with you, and we will be glad to add as a supplemental schedule any portion of our foreign income that comes from affiliated theatres.

Colloquy

Mr. Wright: We had attempted by the pleadings to confine the case to what occurs in the domestic market here. Now, we do not have any interest in going outside; but if the defendants are going to be permitted to go outside the domestic field and offer foreign figures, then we are almost getting into another lawsuit. There ought to be some limit here.

Mr. Proskauer: Well, we are not so much concerned about getting into another lawsuit one way or the other, your Honors. I am offering this because, as I said in my opening, I am going to argue that this huge industry is in large measure dependent on its foreign business for existence, and that if anything is done here which destroys the quality of these pictures along the lines that have been developed, it is going to be a death blow to this industry. I do not want to argue my case fully now. If you have a criticism that this ought to show what of our foreign sales go to theatres that have some source or connection with affiliates, I tell you I am very glad to take that information and add it to this schedule.

(2481)

Mr. Wright: If that is counsel's defense, I submit it is a defense which really has nothing to do with the case that is before the Court.

Mr. Proskauer: Does your Honor want me to argue that now?

Judge Hand: Overruled.

Judge Bright: Judge Proskauer, I do not find that figure you just referred to which you were going to emphasize in your brief.

Judge Goddard: 31.3 per cent, isn't that it?

Mr. Proskauer: Yes, 31.3 per cent, foreign other than Canada, 31.3 per cent.

I offer in evidence a schedule showing comparatively for the years 1930 to the season of 1944 inclusive

Colloquy

the film rentals paid to Loew's by Warner's and the film rentals received by Warner's from Loew's and its affiliates. To that I should like to call attention: If you begin with the year 1931-32 you will see that we paid the Loew's in that year just short of 41 per cent less than we did the previous year. We got from Loew's 42.9 per cent, or just short of 44 per cent more than we did the previous year.

If you go to 1933-34, you see the amount we paid Loew's went up by 45½ per cent. The amount we received from Loew's went up only 14 per cent.

(2482)

If you go to the next year you will see that we increased what we paid Loew's by 3 per cent. They decreased what they paid us by 31 per cent.

The following year we paid them an increase of 22.7 per cent. They paid us a decrease of 62 per cent.

The following year we paid them 25 per cent more than they paid us the previous year. We got from them 18 per cent less.

The succeeding year had no significance. The figures were about the same.

When you come to 1938-39, however, we increased 13 per cent and they increased 22 per cent in what they paid us.

When you come to the following year, we paid them 25 per cent more and they paid us 35 per cent less.

When you come to the following year, we paid them 15 per cent less; they paid us 8 per cent more.

When you come to the following year, we paid them 6 per cent less; they paid us 7 per cent more.

The next year just about balanced.

But the following year we increased with them, what we paid them, 4 per cent; they decreased with us 10 per cent.

Colloquy

And there was a slight variance in the subsequent year.

(2483)

I am going to offer a similar schedule for each company. I am not going to burden you with an analysis now of each one of these, but I am offering it as a basis of proof of what I said in my opening that there is absolutely no pattern between what we buy from and what we sell to any other company.

(Marked Defendant Warner's Exhibit W-6.)

Mr. Proskauer: I am not going to burden you with comment on the other schedules, your Honor. I am simply saying we shall contend that they follow the same lack of pattern.

(Marked Defendant Warner's Exhibit W-7.)

Mr. Wright: Which companies are which numbers?

Judge Bright: Paramount is No. 7, and W-6 is Loew's.

(Marked Defendant Warner's Exhibits W-8 and W-9.)

Mr. Proskauer: The next schedule I offer is a computation of the average cost of each feature picture made by Warner Bros. for the years 1931 to 1945, and in parallel column for each year there is the average theatre admission price at Warner Bros. theatres.

Judge Hand: That is, every kind of a theatre?

Mr. Proskauer: All our Warner theatres.

(Marked Defendant Warner's Exhibit W-10.)

(2484) Mr. Wright: If the Court please, I submit that

there is absolutely no relation or could not be whatso-

Colloquy

ever between the figures that are on the chart here. I do not see how this could possibly be accepted as proof of anything. If this is regarded as the proof that counsel was promising to the effect that costs had not been passed on to the public, there is only one way I know that could be made and that is by a showing as to profit margin. That material, material of this kind, cannot possibly establish the fact that such increases in costs that occurred were not absorbed by the consumer.

Mr. Proskauer: Your Honor, this chart shows that in 1931 our average feature film cost us \$337,000 and our average theatre admission price was 35 cents. Skipping the intervening years, it shows that in 1945 our average feature cost was \$1,371,000, or a little over four times, as I rapidly calculate it, what it was in 1931, and our average theatre price was 1.9 per cent higher than it was back in 1931.

Mr. Wright: Could we have a statement at this time as to how that average theatre admission price was computed?

Mr. Proskauer: It is stated on the schedule. The average admission price is determined by dividing the box office receipts by the attendance, the data given excluding admission taxes.

(2485)

Mr. Wright: That, I take it then, does not represent the average price at any particular theatre at all, is that right?

Mr. Proskauer: It represents the average admission price of all our theatres. If you want them theatre by theatre, we will be glad to supply it. I do not see how the Court would be much interested in that.

Mr. Wright: I suppose we can see the work sheets that were used?

Colloquy

Mr. Proskauer: Certainly. You have seen everything else we have. I don't see why you should not see those worksheets.

(Marked Defendant Warner's Exhibit W-11.)

Mr. Proskauer: For Mr. Seymour's benefit, I think I ought to state that when we use the words "Paramount Pays" we mean the whole Paramount group and not the Paramount Company itself.

Mr. Seymour: I thought I had established quite early in this case that wherever anybody said that, they could mean only that.

Mr. Proskauer: I was afraid of reprisals. I next offer in evidence a schedule of the percentage of Warner film costs paid to Warner's as film rental by the Warner Bros. theatres and theatres affiliated with the four major companies.

(2486)

The significance of that is that figuring in all that we charge our own theatres, and we charge them on the basis you have heard in the testimony, and all we get from the four major defendants, the average for eight years is that that constitutes 55 per cent of our film cost. I am not talking about overhead now, I am just talking about actual negative cost of the production of the picture, and that that is an indication of how much we rely on the independent trade, so-called, to sustain ourselves.

I next offer in evidence a comparison on the cost of a positive print of Princess O'Rourke, and the average film rental per booking. The source of that information is entirely answers to interrogatories with the one exception that we have used the figure \$130 as the approximate cost of making a positive print.

Colloquy

(Marked Defendant Warner's Exhibit W-12.)

Mr. Proskauer: This analysis will show that of the approximately 14,000 bookings of that picture, 12,926 of them brought in an average film rental of \$78.45, being just a little more than half the cost of the positive print, again showing the enormous dependence we have on the large independent business.

The next schedule simply states our profit of our company before Federal income taxes, before foreign income film royalties received for American made
(2487)

pictures, discounts, bond discount, and losses on sales of capital assets, and what it shows is that excluding those other items until the year 1943, when we got into this enormous expansion of attendance at theatres due to the war, we were running in the red. If you excluded particularly our foreign income—

Mr. Wright: Just a minute. I submit, if the Court please, that to receive a series of figures like this, without the form of the statements themselves, which show how these profits were computed, is completely misleading and cannot be competent proof of these facts, even if the facts are material.

Mr. Proskauer: Obviously it is not competent if objection is made to it. I will call an accountant and show he took these figures from our books.

Mr. Wright: If the Court please, there are certainly published statements or statements which counsel has available that will show exactly what the division of profit was here and how these were computed, but to simply put in an overall statement—

Mr. Proskauer: I say these figures were taken from our published statements and modified on the basis of them as herein indicated except that our published

Colloquy

statements do not sometimes show separately stated these specific exclusions which appear on our books. You can send your accountants up to check this or

(2488)

you can refuse to take it and I will call an accountant and prove it.

Mr. Wright: We object to this very definitely in this form. This heading contains a whole series of conclusions as to which there is no possible check——

Mr. Proskauer: Tell me one——

Mr. Wright: —on the basis of the data that is presented here.

Mr. Proskauer: Tell me one conclusion that it contains. Let us analyze that, your Honor. Profit before Federal income taxes. That is no conclusion. We have taken our Federal income taxes——

Judge Hand: What he is really objecting to is, you have not laid any foundation for it.

Mr. Proskauer: I have not laid any technical foundation for any of these things. It is just a question of whether he wants to change the manner in which we are doing this work and making me call an accountant to prove to you this was taken from our books. I have such a man in court.

Judge Hand: Do you want him to do that, Mr. Wright, if he attempts this sort of evidence?

Mr. Wright: If he wishes to put in this sort of evidence, I say that he has got to make a proper showing of what this accountant did. He talks about this as "U. S. A. Production and Distribution Divisions."

(2489)

I do not know how those divisions are set up on what basis they decide they had a loss in America and a profit abroad. I hesitate to see the Court spend time on it, because I do not see how it can possibly affect the outcome of the case one way or the other.

Colloquy

Judge Bright: What is the significance of this proof? What is the purpose of it?

Mr. Proskauer: The significance of the proof is exactly the same as the significance of some of my other charts, and it is to show that, lacking the foreign film rental, that our production and distribution divisions operated at a loss, an actual loss.

Judge Goddard: In the United States?

Mr. Proskauer: In the United States, yes, sir.

Judge Bright: What significance would that have to prove that you did or did not violate the Sherman Act?

Mr. Proskauer: The suggestion that was made in our opening. It really goes in part, your Honor, to the remedy which the Government is seeking of divorcement, and it is a part of our contention that if you divorce these theatres for the reasons which have been set forth here, we are going to be put in a position where we in this country, are going to lose a large part of this foreign revenue, and that the consequence of that would be as shown on this schedule

(2490)

that we would be back, in normal years, in the red, excluding that foreign income.

Judge Bright: Assuming all that, would that be any excuse for violating the Sherman Act?

Mr. Proskauer: Not the slightest. It bears, however, on the question as to whether there is a monopolization, and it also bears very directly on the chief issue the Government tenders us in this case which is remedy. I am going to have more to say about that, your Honors, when we put in some of this arbitration testimony in a few minutes. We have got a consent decree here, and the working of that is important. We could not move to dismiss this bill, I take it, because there already is a decree. What the Government

Colloquy

is really doing is seeking a modification of that decree, that being a final decree, so that this question of remedy is of the essence in this trial itself.

Judge Bright: I have just been wondering whether or not that particular question might more properly come upon the termination of the decree, assuming you are bound to have violated the Sherman Act.

Mr. Proskauer: Let me say, in the almost unbelievable contingency, you should make such a finding, it still would do no harm, surely, to have this in the record, and on the basis of which we could argue before your Honors when you come to that point. I

(2491)

do not regard this as vital. It has been admitted with respect to other companies, Mr. Van Bergh reminds me.

Mr. Wright: If the Court pleases, if this is intended to show, as it appears to do on its face, that the Warner Bros. theatres' profits during this period, when you have these red figures, were used to subsidize their film production and distribution.—

Mr. Proskauer: There is no such intent as that.

(2492)

Mr. Wright: (Continuing) As far as I am concerned, that fact simply lends strength and adds point to the necessity of the relief we are seeking in order that there can be a free competitive market for the distribution of films in this country; but if it is intended to show that there is some necessity to have a closed market in this country, in order to have a profitable exploitation of the foreign market, I submit that, in the first place, these figures cannot possibly demonstrate anything of the kind, and if they did, that the decision as to whether or not that closed market should be permitted here for that purpose is one which would have to be made by the legislative

Colloquy

branch of the Government and not the courts; that this is the kind of data that might be offered to a Congressional committee that was considering legislation to give these people a total or partial exemption from the Sherman Act in this country on the theory that that was desirable to protect the market abroad, but it just is completely outside any of the issues that are posed before your Honors by the pleadings in this case.

Mr. Proskauer: Your Honors, I am not accustomed to having my adversaries frame my contentions for me silently, and I refuse to be put in the position of arguing any such absurdity as has been put in my mouth.

(2493) This has, in addition to what I have said, a direct

bearing on the issue of monopolization. You do not ordinarily have monopolies which operate at a loss. My friend in his argument just tacitly assumed these things about closed markets and all this shibbeloth of the trust buster, which has been answered in testimony here. What kind of a monopoly is it in a domestic market where I can show that in this alleged monopolistic market from 1937 to 1942 inclusive we were actually in the red with respect to our domestic production?

Judge Hand: I am not at all sure that this is appropriate evidence at this time, but we are going to sustain this objection unless you lay a foundation.

Mr. Proskauer: I will call a witness.

Judge Hand: That is all right; it will go in then. It will go in with whatever consequences may result. We do not pay any attention to arguments to exclude it any more than we have in the past, but I think this objection is perfect.

Colloquy

Mr. Proskauer: So do I. I have not argued against it.

Why don't you take it subject to correction and modification, the way you have other schedules?

Mr. Wright: I will say this again, in order not to spend the time of the Court in having a witness develop from the stand what he did in getting at these
(2494)

figures, if we can have a comprehensive statement from him submitted to us in letter form or otherwise, and can be permitted to ask such appropriate questions as we desire to outside of the court and get the answers to them, then I have no objection.

Mr. Proskauer: All right. Mark it upon my assurance that you shall have such a letter before the sun sets tomorrow.

(Marked Defendant Warner's Exhibit W-13.)

Mr. Proskauer: My last exhibit that I offer, your Honors, I am offering, I must say frankly, following precedent. Everybody else has offered it and I do not think it is very important. It is just a statement of our theatre properties as at May 26, 1945, as they are carried on our books.

(Marked Defendant Warner's Exhibit W-14.)

Mr. Proskauer: Mr. Wright, may I read in Bernhard's statement, with your permission?

Mr. Wright: Certainly.

Mr. Proskauer: Mr. Wright has stipulated that Joseph Bernhard, if called as a witness, would testify in accordance with the statement which I hold in my hand, with the same force and effect as though he had been sworn as a witness and taken the stand and subjected himself to cross-examination.

Bernhard

(2495)

Judge Hand: What is the name?

Mr. Proskauer: Joseph Bernhard. I will read only a portion of this, your Honors; and then, if Mr. Wright is agreeable, let the rest just be transcribed into the record.

"I have been head of the Theatre Department of Warner Bros. Pictures, Inc. from December 18, 1931 until November 7, 1945. I have resigned that position as of November 7, 1945 having acquired a 50% interest in United States Pictures, Inc., engaged in the business of producing feature motion pictures. This corporation now has a contract with Warner Bros. Pictures, Inc. for the distribution of pictures to be produced by it.

"I have and have had complete familiarity with the fundamental policies of the Theatre Department of Warner Bros. Pictures, Inc. and its subsidiaries during my tenure of office.

"I deny that said companies or any of them have at any time during my connection with them attempted to monopolize or monopolized any part of the motion picture business or that they or any of them have contracted, conspired or combined with any person or persons or company or companies so to do. I deny each and every charge in the amended and supplemental complaint herein.

(2496) "When I became head of the Theatre Department

Warner Bros. Pictures, Inc. and its subsidiaries had an interest in about 585 theatres located in 22 States and the District of Columbia. A substantial number of these theatres were situated in and around Pennsylvania and New Jersey. As a resident of Philadelphia for many years prior thereto I was generally familiar with the theatres in and about Philadelphia

Bernhard

and knew that prior to the acquisition of the stock of Stanley Company of America by Warner Bros. Pictures, Inc. the best downtown theatres suitable for motion pictures had been in the common ownership of Stanley Company of America for many years. In fact my best recollection is that Stanley Company of America had the best theatres most suitable for the exhibition of motion pictures as far back as the introduction of feature motion pictures in the industry and that Stanley Company of America had prospered under the able leadership of Jules Mastbaum, who died shortly before Warner Bros. Pictures, Inc. acquired the stock of Stanley Company of America.

"I deny that Warner Bros. Pictures, Inc. acquired an interest in any theatre during my tenure of office with the purpose of having theatres where they would not be in competition with the theatres of any other person or company, or that there was any agreement or understanding, express or implied, to any such effect. All our theatres were acquired in the open

(2497)

market and in most cases in open and keen competition. Some of such theatres were acquired in competition with competing companies producing motion pictures.

"Since I have been head of the Theatre Department I have had no policy for the expansion of theatre holdings. When I severed my connection with Warner Bros. Pictures, Inc., it had an interest in 547 theatres located in 18 states and the District of Columbia, a net reduction of 38. Any theatres acquired in the interim were to protect our business and meet the varying economic conditions, shift of populations or needs caused by obsolescence which had arisen with the changes over the years.

Bernhard

"I have read the testimony of Harry M. Warner, president of Warner Bros. Pictures, Inc. in this trial and state that any references therein to the theatre situation in so far as they occurred during my connection with the company are true.

"I have always operated the Theatre Department separate and apart from the Distribution Department of Warner Bros. Pictures, Inc. and have never allowed the operations of the Distribution Department to influence my judgment in the licensing of pictures for the Theatre Department. I have requested counsel in this case to collate from the Theatre Department and the Distribution Department instances which
(2498)

tend to show what I have just stated as a fact, which are attached hereto as Exhibit 'A'."

That exhibit I will ask to have offered as part of this statement and marked.

(Marked Defendant Warner's Exhibit W-15.)

Mr. Proskauer: I will refer to that in a moment, your Honors. (Continuing reading):

"I believe the information therein contained to be true but since I do not know all of this information of my personal knowledge I requested counsel for Warner Bros. Pictures, Inc. to make available to plaintiff's counsel the records of our company with respect thereto so that any inadvertent inaccuracy, if any, may be corrected.

"In my opinion the quality of motion pictures produced would be jeopardized by divorcement of the theatres from production with hardship not only to the producers of motion pictures, of whom I am now one, but also to the public and to whomsoever may own or operate motion pictures in this country at the conclusion of this trial."

Bernhard

The rest of the statement consists of formal denials of the character that Mr. Skouras gave, and if it is agreeable to Mr. Wright and your Honors, I will just ask that that be spread upon the record.

(Balance of statement referred to is as follows:)

(2499)

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to restrain competition in the production, distribution or exhibition of motion pictures in the United States? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to aid and assist one another in the loaning and exchanging of production personnel and to deal with one another on uniform, non-competitive terms? A. No.

"Q. Has there been any agreement or understanding to your knowledge to withhold any of the production personnel and equipment from any producer of motion pictures? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independent producers from access to production personnel and to withhold production equipment owned by the defendants or any of them on the same terms on which they are made available to the defendants in this case? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to fix the terms upon which motion pictures would be licensed for exhibition to any exhibitor in the United States? A. No.

Bernhard

(2500)

"Q. Has there been or is there to your knowledge any agreement among the defendant or any of them to license any pictures for exhibition in any theatre before the pictures have been produced and before any exhibitor has had a fair opportunity to estimate the value and character of the films licensed and before such films have been completed or tradeshowm?

A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to condition the licensing of one or more films or group of films upon the licensing of another film or group of films? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to condition the licensing of film in one theatre or group of theatres upon the licensing of film in another theatre or group of theatres?

A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into long term franchises with circuits of theatres or to suppress competition offered by competing theatres during the terms of such long term franchises or to preclude independent distributors from licensing their pictures to those circuit theatres? A. No.

(2501)

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to discriminate with respect to the license terms granted to circuit theatres because such theatres are part of the circuit? A. No.

Bernhard

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them in licensing their pictures to favor the theatres in which the defendants or any of them had an interest against the theatres of exhibitors not affiliated with any producer-distributor with respect to run, clearance, license fees or any other terms of licensing? A. No, sir.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any two or more of them to license pictures for exhibition in the theatres in which one of the defendants had an interest, on condition or in consideration of another licensing its pictures with respect to the pictures distributed by the other? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude independently produced motion pictures from theatres in which the defendants or any of them had an interest? A. No.

(2502)

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from the operation of competing first-run theatres in cities and towns where theatres affiliated with defendants or any of them are located? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to exclude unaffiliated exhibitors from operating competing theatres on the same run as the subsequent-run affiliated theatres in the cities and towns where affiliated theatres are located? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defend-

Bernhard

ants or any of them to use the first and early run affiliated theatres to control the film supply, run, clearance and admission price of operators of competing unaffiliated theatres in the cities and towns where affiliated theatres are located, or elsewhere?
A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them as to the terms upon which each or any of them would license their film to unaffiliated exhibitors? A. No.

(2503).

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to deprive any theatre operator of the supply of film or to withhold film from an unaffiliated exhibitor or to limit the terms and conditions on which licenses would be made to any unaffiliated exhibitor? A. No.

"Q. Has there or is there to your knowledge any agreement or understanding among the defendants or any of them to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area without competitive negotiations?
A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them not to compete with one another in the licensing of motion pictures to be exhibited in cities or towns where two or more of them had interests in theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to enter into joint agreements

Colloquy

with respect to a theatre whereby the film buying control or proceeds from the operation thereof is divided between two or more exhibitor defendants for the purpose of restraining competition unreasonably or

(2504)

monopolizing exhibition or distribution with respect to such theatre? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to refrain from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres? A. No.

"Q. Has there been or is there to your knowledge any agreement or understanding among the defendants or any of them to acquire a monopoly or to monopolize the business of exhibiting motion pictures in the United States or any city or town thereof? A. No."

(2505)

I should like to call your attention to some of the situations shown in this exhibit. In 1930 and 1931 the distribution department did not license RKO New York Metropolitan theatres. The theatre department on the other hand licensed RKO pictures generally. The distribution department licensed Paramount affiliates. The theatre department did not license Paramount.

In 1932 the distribution department licensed Loew New York Metropolitan theatres. The theatre department did not license Loew's pictures until late in the season, when it licensed all or part of Loew's pictures in approximately 150 of the 250 theatres in which it played Loew's pictures in the previous year.

I do not want to read that whole thing, but it is with a reference to particular companies entirely cor-

Colloquy

roborative of the chart I read to your Honors which showed the lack of pattern and the variances in amount; and I shall argue that this schedule bolsters up and puts flesh on that schedule of figures that I gave.

I think that is all.

Mr. Bafferty: I want to supply the difference between the 73 and 92 that were missing. It will only take a minute. I have got a witness here, but if we can dispense with the witness and allow me to testify as Judge Proskauer did, we can perhaps do it a little faster.

(2506)

Judge Bright: Judge Proskauer, is that the close of the Warner case?

Mr. Proskauer: You are referring to the specific Warner testimony?

Judge Bright: Yes.

Mr. Proskauer: I think it is. I am going to ask Mr. Wright to make some kind of general stipulation with me about witnesses not called.

Would you stipulate no inference is to be drawn from—

Mr. Wright: We certainly would not.

Mr. Proskauer: You want me to call all my theatre managers from all over the country?

Mr. Wright: Any testimony you want to put in the record should be in the record. We won't do it.

Mr. Proskauer: All right. You have stipulated with other people that if subordinates were called they would give the same testimony as the superior gave.

Mr. Wright: We have made no such stipulation with anyone, and we do not proposed to make any.

Mr. Proskauer: I shall have to answer your Honor's question by saying I want to reserve judgment as to whether I have got to call all my exchange

Colloquy

managers and theatre managers from all over the United States.

Mr. Raftery: This is in reference to United Artists:

(2507)

In Exhibit 145, Government's Exhibit, Mr. Wright asked us about 92 cities but only supplied 73 that he wanted answers. We answered only 73. Since the date of our examination he gave us 19 cities, and there is the rest of 145.

In connection with United Artists Exhibit 1, the same situation applied, and we have now answered as to the other 19, which show that United Artists played Stage Door Canteen in seven independent situations in the 19 cities and 12 affiliated. And I merely want to add this as the last page of Exhibit UA-1.

Mr. Wright: That is agreeable.

Mr. Raftery: So it will be page 5 of that exhibit.

As regards the 92 cities, I have secured from Mr. Wright the Stage Door Contract which I believe Judge Bright was examining Mr. Lazarus about, which showed sliding scale percentage starting at 20 per cent, and going to 50 per cent on the first-run exhibitions in the Fox theatres; and I have picked out the situations where we had the sliding scale contracts both with independents and affiliated, and I have added one column in those towns. I had the witness here who made the computations, but Mr. Wright, I believe, will agree on them with me.

If your Honors will look at UA-1, in Los Angeles, California, we played an affiliated theatre, and according to the contract we got 20 to 50, and all it

(2508)

shows on UA-1 is the film rental without showing the actual percentage.

Colloquy

Now, in the Pathe Circle we received \$3,691.29 for the first week's film rental, which represented 41 per cent of the gross receipts.

In the Ritz we received 39 per cent for one week.

In Loew's State, 42 per cent.; Grauman's Chinese, 36 per cent; the United Artists, which was the move-over, 48 per cent; in the Wilshire, a move-over, 27 per cent; in the Four Star, we played six weeks more on a move-over, and by weeks we got 35 per cent the first, 33 the second, 33 the third, 28 the fourth, 29 the fifth, and 23 the sixth.

The next situation is the Music Hall in Seattle, also an affiliated house, and also on this Stage Door Canteen contract. The first week at the Music Hall, 47 per cent; at the Paramount day and date, the first week, 38 per cent; it played a second week and we got 34 per cent.

At the Music Box we played four weeks on a move-over: the first week, 45; second week, 45; the third week, 40; 36 the fourth.

In Denver, Colorado, which are also National theatres under the same contract: The Esquire, 49 per cent; the Denver, 46 per cent; we then moved to the Aladdin and we got 45 per cent for a week; the second week of the move-over at the Aladdin, 25 per cent. The Rialto, 35 per cent; and then the Broadway for three more weeks, 39 per cent the first, 41 per cent the second, 41 per cent the third.

Now, Portland, Oregon, is an independent. We got 50 per cent the first week; 50 per cent the second week; 45 per cent the third week; and then we moved over to an independent's move-over house and got 35 per cent.

Colloquy

At Oakland, California, which is affiliated, at the Paramount we played two weeks; the first week 47 per cent; the second week 33 per cent.

At the Franklin we played three weeks on a move-over and got 33 per cent the first, 32 per cent the second, 27 per cent the third.

Now, San Francisco, California, is an independent. We played ten weeks. The first week, 50 per cent; 50 per cent the second; 45 per cent the third; the fourth week we got part 40 per cent and part 50 per cent. That is due to an overlapping of days. The next week we got 40 per cent; the sixth week 40 per cent; the seventh week 35 per cent; the eighth week 35 per cent; the ninth week 35 per cent, and the tenth week 25 per cent.

And in San Diego, which is affiliated, the first week 48 per cent in one house, the Fox; in the State, which played day and date, we got 45 per cent. We then moved over to the Orpheum, and we got 45 per cent the first week and 44 per cent the second week.

(2510)

At Long Beach, also affiliated, the first week 46 per cent, and then moved over to the Long Beach where we got 45 per cent the first week and 45 per cent the second week.

In Spokane, also a Fox affiliate, the first week 48 per cent; then moved over and got 36 per cent at the move-over house.

At Sacramento, also affiliated, we got 43 per cent in one house, the Senator, playing day and date with the Alhambra. They paid us 45 per cent.

Tacoma, an independent, the first week we got 50 per cent; then we moved to the Blue Mouse and we got 37½ per cent over \$3,000. That is a split figure.

Colloquy

Then we played one extra day and got 25 per cent of the gross over \$2200.

Mr. Wright: It says "under." Should that be "over."

Mr. Raftery: Oh, I am sorry. It is 25 per cent under, because it is only \$83.

I won't bother offering those things I have read into the record.

Now, as regards Universal, I will be even more brief. Exhibit U-2 is the heaviest exhibit that either of these defendants have gotten into the record, and it is a list of all the franchises, and I am going to try to sum the whole exhibit up in one short sentence. We

(2511)

counted the franchises, and they total 770, not 500 as Mr. Scully testified. There are 770. There are 43 with affiliated and 727 with independent exhibitors.

Now to get back to the 19 cities——

Mr. Wright: Excuse me. Is that last in evidence? That is, isn't it?

Mr. Raftery: Yes. I just added them up.

Mr. Wright: Yes, I see.

Mr. Raftery: You can correct me on anything I say. But I took the holiday off and added it, and I think it is right.

Now, with regard to Universal Exhibit 1 where we answered 73, of the 19 additional which I want added as page 3 of U-1, we were only able to sell 18 of the 19. Do you remember the witness Scully said that Plam Beach Yamins would not buy his product up in Fall River. So we got 18 cities. Five we sold affiliated and 13 independent in the 92.

Mr. Wright: That will be the third page of U-1?

Mr. Raftery: Yes, the third page of U-1.

Nicholas M. Schenck

Now, as regards our exhibits, we are going to put them together and furnish the Court with a bound set of exhibits, and we won't discriminate. We will see that the affiliated get it as well as the independents.

(2512)

Mr. Davis: If the Court please, I want to read into the record a stipulation on behalf of Loew's Incorporated.

It is stipulated, that Nicholas M. Schenck, if called as a witness on behalf of Loew's Incorporated, would testify as follows, this stipulation being received with the same force and effect as if he had appeared on the stand and subjected himself to cross-examination:

"I am President of Loew's Incorporated and I have been President of Loew's since September 19, 1927. I was Vice-President of Loew's from the time it was organized in 1919 until I was elected President in 1927. As President I am the executive head of Loew's and have the general supervision of its business, including the production, the distribution and the exhibition of motion pictures in the United States. I own no interest either through stock or otherwise in any motion picture, producing, distributing or exhibiting organization other than Loew's, and I own no interest in any other form of theatrical enterprise.

"My first connection with the entertainment industry was in 1907, when I started with Mr. Marcus Loew in the business which ultimately became Loew's Incorporated. When I joined Mr. Loew he had a small organization which operated one or two vaudeville theatres and a few remodeled penny arcades where

(2513)

single reel motion pictures were exhibited. I started without any specific kind of work, practically as an

Nicholas M. Schenck

apprentice, learning the business. I continued to be associated with Mr. Loew in the operation of the Marcus Loew Booking Agency, which was organized in 1910, and of Loew's Theatrical Enterprises which was organized in 1911 to carry on Mr. Loew's various vaudeville and motion picture enterprises.

"Our business expanded slowly and in 1919, we had about 50 theatres, mostly in New York City and most of which at that time used vaudeville and feature motion pictures. We still had a rather small organization when we formed Loew's Incorporated in 1919. Mr. Loew was the first president of Loew's Incorporated and he held that position until his death in 1927.

"Ever since Loew's became a producer and distributor of motion pictures, its feature motion pictures have been advertised and known as 'Metro Pictures'. For a long time the three divisions of the business, producing, distributing and exhibiting were carried on by separate corporations; Metro-Goldwyn-Mayer Corporation made the pictures, Metro-Goldwyn-Mayer Distributing Corporation distributed the pictures, and Loew's Incorporated of which the other two companies were subsidiaries, operated motion picture theatres. While in 1936-1937, the corporate

(2514)

structure was simplified and the producing and distributing corporations merged into Loew's Incorporated, the three functions of producing, distributing and exhibiting were continued as completely separate units.

"As of August 31, 1944, the theatres in the United States in which Loew's had an interest either through ownership or leasehold had a book value, apportionable to Loew's interest, of nearly \$69,000,000 and an assessed valuation so apportionable of about \$57,000,000.

Nicholas M. Schenck

"There is not now and to the best of my knowledge, information and belief there has not been any contract, agreement, understanding or concert of action between Loew's Incorporated and any one or more of the defendants with respect to any of the following matters:

"(1) The restraining of competition among or between the defendants, or any of them, in either the production, or the distribution, or the exhibition of motion pictures.

"(2) The terms upon which or the time when feature films were or were to be licensed by any distributor defendant to any exhibitor in the United States.

"(3) The discriminating in favor of so-called 'affiliated' or so-called 'circuit' theatres and against so-called 'independent' theatres with respect to any of the license terms granted because of the fact

(2515)

of being a part of a circuit or because of the so-called 'affiliation'.

"(4) The exclusion of so-called 'independently' produced films from so-called 'affiliated' theatres.

"(5) The exclusion of so-called 'independent' exhibitors from operating first run theatres in competition with so-called 'affiliated' theatres.

"(6) The exclusion of so-called 'independent' exhibitors from operating subsequent run theatres on the same run as and in competition with so-called 'affiliated' theatres.

"(7) The use of first and other early-run so-called 'affiliated' theatres to control the film sup-

Nicholas M. Schenck

ply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres.

"(8) The division of available films among theatres owned or controlled by two or more producers-exhibitor defendants.

"(9) The refraining from building, buying or offering to lease theatres in areas where they might compete with existing so-called 'affiliated' theatres.

"(10) The division of territory of the entire United States, or any part thereof, between the producer-exhibitor defendants for theatre operat-

(2516)

ing purposes.

"(11) The loaning and exchanging of production personnel and equipment among the defendant producers on uniform and non-competitive terms and excluding so-called 'independent' producers from access to such personnel and equipment on equal terms.

"(12) The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers.

"(13) The form of license agreement used or to be used after 1930, in licensing the exhibition of films or any provision included or to be included therein.

"(14) The film rental, whether flat or percentage, charged or to be charged by Loew's Incorporated to any theatre or theatres.

"(15) The run granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre.

Nicholas M. Schenck

"(16) The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner or form in which the clearances in any city or area shall be set up or stated.

(2517)

"(17) The minimum admission prices inserted or to be inserted in licenses for any theatre, whether a so-called 'affiliated' theatre or not."

(Mr. Davis: And I may say to the Court by way of parenthesis that those different acts which are charged are to be found in the bill of complaint and in the trial brief. The effort in this catalogue is to meet the specific charges of combination which were made against this defendant in those regards.)

"In saying this I do not, of course, refer to individual contracts licensing the exhibition of films which Loew's, as a distributor or exhibitor, has regularly made in the course of its business with another of the defendants herein, the legal effect of which is limited to the contracting parties. I do deny any combination of the defendants to do the acts which I have mentioned at any time after the ending of the National Recovery Act."

(Mr. Davis: During which period I again say by way of parenthesis, as we all know, there was a considerable concert of action.)

"It is also stipulated that Mr. Schenck would testify as follows:

"Loew's has not prevented any defendant or any so-called 'independent' producer from competing with Loew's in the production of films.

Nicholas M. Schenck

(2518)

"Loew's has not prevented any defendant or any so-called 'independent' distributor from competing with Loew's in the distribution of films.

"Loew's has not prevented any defendant or any so-called 'unaffiliated' exhibitor from competing with Loew's in the operation of theatres.

"Loew's has never discriminated in favor of so-called 'affiliated' or so-called 'circuit' theatres and against 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called 'affiliation.'

"Loew's never has conditioned its granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's.

"No other producer-exhibitor defendant ever has conditioned its granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's upon Loew's granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by such other defendant.

"Loew's never has had and does not now have any agreement or understanding with any distributor with respect to the minimum admission prices which such

(2519)

distributor should insert in its licenses for any theatre or theatres not operated or controlled by Loew's.

"Loew's never has had and it does not now have any agreement or understanding with any distributor

Berger, Flynn, O'Shea, Maloney and Hickey

with respect to the run which such distributor should grant for any theatre or theatres not operated or controlled by Loew's or the order or sequence of runs between such theatres."

(Mr. Davis: Follow me now, Mr. Wright, will you, because this is not in my memorandum.)

"It is further stipulated and agreed that if there were put to the witness Schenk the questions which were put to the witness Zukor as shown by pages 612, 617 of the printed record, and folios 864 to 870 of the stenographic record, he would answer each and all of those questions in the negative."

(2520)

I shall also read the following stipulation:-

"IT IS STIPULATED that if Rudolph Berger, J. E. Flynn, E. K. O'Shea, J. J. Maloney and G. A. Hickey were called as witnesses on behalf of the defendant, Loew's, Inc., each would testify as follows, this stipulation being received with the same force and effect as if they had appeared upon the witness stand and submitted themselves to cross-examination"——

Mr. Wright: If the Court please, just a minute. I do not see anything in these written stipulations here about the same force and effect as if. As I read the stipulation——

Mr. Davis: To tell you the truth, it was not in my draft, Mr. Wright, but I heard each one of my more cautious and expert colleagues insert that, and I did not want to be submitted to an invidious comparison.

Mr. Wright I think that is a matter that you can argue, of course, but I think the stipulations ought

Berger, Flynn, O'Shea, Maloney and Hickey.

to be confined to the wording that was submitted to us when we agreed to accept them.

Mr. Davis: I am not sure that the phrase is necessary to give this stipulation effect, but its having been used without objection in all the other stipulations read, I submit I am entitled to it. That is the effect, that is the purpose of the stipulation, of course, to

(2521)

supply the presence of the witness.

Mr. Wright: There is no question about that. But nobody should be under any illusions that we will not argue from each of these stipulations that what is unsaid in those may be far more important than anything that is said.

Mr. Davis: Of course, I am not asking you to admit the truth of the witnesses' statements. All you are proposing to admit is that if the witness appeared in court he would testify to this effect.

Mr. Wright: This is what he would say, that is right.

Mr. Davis: And this stipulation, manifestly, has the same effect as if the witness had appeared and been sworn and been submitted to cross-examination. Now, that is a legal conclusion, but I really do not see any reason why it should not be made of record.

Judge Hand: I think that is all right. It has gone in for the others anyway, and it is its effect, I should say.

Mr. Davis: I shall now continuing reading this stipulation—

Judge Bright: Who were the four gentlemen?

Mr. Davis: I am about to state. Each witness testifies:

(2522)

"At the present time I am one of the five Division Sales Managers of Loew's Inc. I have been employed

Berger, Flynn, O'Shea, Maloney and Hickey

by Loew's, Inc. or its predecessor organization, since the date set forth below following my name, and I have supervision of the Loew's exchanges in the cities likewise set forth following my name:

"Rudolph Berger Feb. 6, 1924 *South*
Atlanta
Charlotte
New Orleans
Dallas
Kansas City
Oklahoma City
Memphis

"J. E. Flynn Feb. 19, 1918 *Midwest*
Chicago
Des Moines
Milwaukee
Minneapolis
Denver
Omaha
Salt Lake City

"E. K. O'Shea May 10, 1920 *East*
Boston
New Jersey
New York
Albany
Buffalo
New Haven
Philadelphia

"J. J. Maloney Aug. 21, 1922 *Central*
Cleveland
Detroit
Indianapolis
St. Louis

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Cincinnati
Washington, D. C.
Pittsburgh

(2523)

"G. A. Hickey

Oct. 13, 1917

West Coast

Los Angeles
Portland
San Francisco
Seattle.

"2. In the respective exchange areas over which I have supervision, there is not now, and to the best of my knowledge, information and belief there has not been any contract, agreement, understanding or concert of action between Loew's, Inc. and any one or more of the defendants with respect to any of the following matters:

"The restraining of competition among or between the defendants, or any of them, in either the distribution or the exhibition of motion pictures.

"The terms upon which or the time when feature films were or were to be licensed by any distributor defendant to any exhibitor.

"The discriminating in favor of so-called 'affiliated' or so-called 'circuit' theatres and against so-called 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called 'affiliation'.

"The exclusion of so-called 'independent' exhibitors from operating first run theatres in competition with so-called 'affiliated theatres.

(2524)

"The exclusion of so-called 'independent' exhibitors from operating subsequent run theatres

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on the same run as and in competition with so-called 'affiliated' theatres.

"The use of first and other early run so-called 'affiliated' theatres to control the film supply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres.

"The division of available films among theatres owned or controlled by two or more producer-exhibitor defendants.

"The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers.

"The form of license agreement used or to be used after 1930, in licensing the exhibition of films or any provision included or to be included therein.

"The film rental, whether flat or percentage, charged or to be charged by Loew's Incorporated to any theatre or theatres.

"The run granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre.

(2525)

"The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner or form in which the clearances in any city or area shall be set up or stated.

"The minimum admission prices inserted or to be inserted in licenses for any theatre, whether a so-called 'affiliated' theatre or not.

"In saying this I do not, of course, refer to individual contracts licensing the exhibition of films which Loew's, as a distributor or exhibitor has regularly made in the course of its business

Berger, Flynn, O'Shea, Maloney and Hickey

with another of the defendants herein, the legal effect of which is limited to the contracting parties. I do deny any combination of the defendants to do the acts which I have mentioned at any time after the ending of the National Recovery Act.

"3. It is also stipulated that each of said witnesses would testify that in the respective exchange areas over which he has supervision:

"A. Loew's has not prevented any defendant or any so-called 'independent' distributor from competing with Loew's in the distribution of films.

"B. Loew's has never discriminated in favor of so-called 'affiliated' or so-called 'circuit' theatres and (2526)

against 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called affiliation.

"C. Loew's never has conditioned its granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's.

"D. Loew's has no agreement or understanding with any prior run exhibitor, either a so-called affiliate or independent, fixing the minimum admission price which Loew's must insert in its license agreement with a subsequent-run exhibitor."

Joseph R. Vogel and Charles C. Moskowitz

Mr. Davis: I also offer this stipulation:

"It is stipulated that Joseph R. Vogel and Charles C. Moskowitz, if called as witnesses on behalf of Loew's, Inc. would testify that they have been in the employ of Loew's, Inc. and its predecessors since October 10, 1909 and January 20, 1913, respectively; that both of them are presently vice-presidents of Loew's, Inc.; and that the said witnesses have between them the entire supervision and control of the 131

(2527)

theatres presently operated by Loew's, Inc. throughout the United States.

"It is further stipulated that each of said witnesses would testify as follows, with the same force and effect as if they had appeared on the witness stand and subjected themselves to cross-examination:

"1. There is not now, and to the best of my knowledge, information and belief, there has not been any contract, agreement, understanding or concert of action between Loew's, Inc. and any one or more of the defendants with respect to any of the following matters:

"The restraining of competition among or between the defendants, or any of them, in either the distribution or the exhibition of motion pictures.

"The exclusion of so-called 'independently' produced films from so-called 'affiliated' theatres.

"The exclusion of so-called 'independent' exhibitors from operating first run theatres in competition with so-called 'affiliated' theatres.

"The exclusion of so-called 'independent' exhibitors from operating subsequent run theatres on the same run as and in competition with so-called 'affiliated' theatres.

Joseph R. Vogel and Charles C. Moskowitz

(2528)

"The use of first and other early run so-called 'affiliated' theatres to control the film supply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres.

"The division of available films among theatres owned or controlled by two or more producer-exhibitor defendants.

"The division of territory of the entire United States, or any part thereof, between the producer-exhibitor defendants for theatre operating purposes.

"The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers.

"The run granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre.

"The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner or form in which the clearances in any city or area shall be set up or stated.

"The minimum admission prices inserted or to be inserted in licenses for any theatre, whether a so-called 'affiliated' theatre or not.

(2529)

"In saying this I do not, of course, refer to individual contracts licensing the exhibition of films which Loew's, as a distributor or exhibitor, has regularly made in the course of its business with another of the defendants herein, the legal effect of which is limited to the contracting parties. I do deny any combination of the defendants to do the acts which I have mentioned at any time after the ending of the National Recovery Act.

Joseph R. Vogel and Charles C. Moskowitz

"2. Loew's has not prevented any defendant or any so-called 'unaffiliated' exhibitor from competing with Loew's in the operation of theatres.

"3. No other producer-exhibitor defendant ever has conditioned its granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's upon Loew's granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by such other defendant.

"4. Loew's has no agreement or understanding with any distributor, either a so-called 'affiliated' or 'independent', fixing the minimum admission price which a subsequent run exhibitor of said distributors feature pictures must charge."

(2530)

Mr. Davis: I have under consideration, if the Court please, two or three more exhibits on the part of Loew's. I am not sure I shall offer them, but I am not prepared yet to announce that that is all of the Loew case.

Mr. Leisure: The affidavit just read by Mr. Davis brings up a question which I believe was clear in the record, and I still think it is. When Mr. Seymour read the long list of questions to Mr. Zukor, I understood Mr. Wright at that time agreed that all of the defendants would if asked that long list of questions on general conspiracy, would deny them. And I want the record to show that we have that same privilege with respect to Mr. Rathvon, Mr. Mochrie and Mr. Koerner.

I do not think there is any question about that, is there, Mr. Wright?

Mr. Wright: Not at all.

Mr. Leisure: The record so showed.

Colloquy

(2531)

Mr. Proskauer: Could we have a very short recess, your Honors? I want to clean up something with Mr. Wright. I think we can do it in two or three minutes, if I can talk to him. It may be necessary for me to write out something.

Judge Hand: Yes.

(Short recess.)

Mr. Seymour: May it please the Court, I am going to offer on behalf of my clients certain of the decisions of the appeal board set up under the consent decree, which haven't been offered by the other side. I am offering them for the limited purpose of showing the operations of the appeal board under the decree and some of the considerations in disposing of disputes which the decree provides, with the consent of both sides shall be submitted to the arbitration. The decisions that I am going to offer, and I am going to distribute copies to all members of the Court, are, and I will have them marked as one exhibit, 3, 9, 21, 29, 34, 40a, 51, 55, 57, 59, 61a, 62, 76, 89, 90, 91, 92, 93, 97, 105, and 113.

Those decisions have been selected because they illustrate certain important matters which the appeals board has considered and which we have discussed in the course of this trial with respect to clearance, and I would like to mention those just briefly, as a matter of convenience, at this point in the record.

(2532)

These are some of the things that the Court will see from these decisions: First, that most of the disputes about clearance are between independent exhibitors, one independent exhibitor wants to get a clearance of another independent exhibitor reduced.

Colloquy

Most of the litigants are independent exhibitors. Occasionally an affiliated theatre is involved, but, generally speaking, the contest is between independents. The Appeals Board decisions show the consideration given to the great variety of elements that enter into the original fixing of clearance between the distributor and the exhibitor; they show that great weight is given to the problem of the distributor in getting maximum revenue from a theatre and in granting clearance in the light of his maximum revenue, a matter which has been covered in the testimony; they show the importance to the exhibitor, when he has a high quality house, of getting adequate clearance to protect his exhibition of the pictures; they show how clearance is related to geographical areas. Where there is a metropolis surrounded by suburban areas, they show how it is even proper to have rather extensive clearance. These are generally in favor of independent exhibitors. Where there are subsequent-run theatres in large cities, they show that the geographical areas are often considered not to be

(2533)

so large as where the cities are of different character.

Several of these decisions show a matter which was adverted to by Judge Bright yesterday when a witness was on the stand, that is, that distributors sometimes grant different clearances; they show that where there is a difference in clearance, often the arbitrators look to the clearance granted by the majority of the distributors as perhaps the proper clearance, and the upshot of the decisions ordinarily is to bring those clearances into line, as they are in many places, without resort to arbitration.

Many of these opinions show the importance necessarily given under the decree to the admission

Colloquy

price, charged by the theatre over which it has clearance, a factor squarely recognized as a proper consideration by the consent decree, to which the Government was a party.

Many of them show, or several of them show that where the distributor has a satisfactory customer, it is not arbitrary not to leave the customer, a matter which has been covered here in the testimony.

There has been testimony here about move-overs. Several of these decisions recognize the practice of move-overs, even among independents as well as others.

(2534) One of the opinions indicates that generally in the distribution of pictures there is no national release date; that pictures are released differently in different parts of the country.

One of the decisions shows that the thing the arbitrators were considering was quite a different thing than the problem of violation of the anti-trust laws, which we mentioned somewhat earlier, but I think the great importance of these opinions, aside from these particular things I have mentioned, is that when you see the various elements which the decree recognizes and which the arbitrators and the Appeals Board have considered, that it is a matter of business judgment in each case, depending on the local situation, problems affecting local theatres and local competitive conditions; the kind of business question which the decree recognized has to be settled by somebody reviewing business judgment, and you see in these opinions that frequently the arbitrator has reached a different conclusion on business judgment than the distinguished lawyers who were members of the Appeals Board appointed by the Court.

J. Noble Braden—By Defendant—Direct

With that preview of what your Honors will find, I think you will find these very revealing on many of the matters we discussed in the case, and I now offer them as one exhibit. They can be conveniently referred to by a number under the exhibit number heading.

(2535)

(Marked Defendant Paramount's Exhibit P-13.)

J. NOBLE BRADEN, called as a witness on behalf of defendant Warner Bros., being first duly sworn, testified as follows:

Direct Examination by Mr. Proskauer:

Q. Mr. Braden, what is your position with the American Arbitration Association? A. Tribunal vice-president and executive director of the motion picture arbitration system.

Q. And you have been in active supervisory charge of the project of arbitration as set up under the consent decree in this case? A. Yes, sir.

Q. And that is since its inception? A. Yes, sir.

Q. Is there a special administrative committee of the Association that has supervisory charge with you of this? A. Yes, sir.

Q. And that committee is made up of Mr. Wesley A. Sturges, Mr. Hermann Irion, James F. Hughes, Frances Kellor, S. Whitney Landon, Samuel D. Leidesdorf, John P. McGovern, Lee J. Eastman, and Paul Felix Warburg? A. Yes, sir.

Q. Will you tell us briefly how you set this machinery up and how you divided it? A. We were consulted first by the Attorney General's office and the attorneys for the distributor defendants in June, 1940, when the conferences were

J. Noble Braden—By Defendant—Direct

on settling the previous motion picture case, and we first (2536)

conferred, and in conference with the Attorney General's representatives and the attorneys for the distributors, formulated the rules which are part of the decree itself, and Judge Goddard signed the decree on November 22nd. We then proceeded in accordance with the direction of the Court to establish 31 arbitration tribunals for the arbitration of disputes between the exhibitors and the distributors, and I personally visited each one of the 30 cities outside of New York to establish those tribunals. In doing that we had a number of things to consider. Bringing in a new arbitration system into any city may arouse trouble, particularly with some of the bar associations, who are not too friendly to arbitration. The first thing we did was to call together a luncheon conference of about 10 leading citizens in each community.

Mr. Wright: If the Court please, I haven't any objection to having a statement here as to what has been done generally under the arbitration system but I really think it is unnecessary to go into the details of these luncheon meetings and who was seen here and there.

Mr. Proskauer: Oh, yes, we will make it very brief. I am in accord with Mr. Wright, that we don't want to go too far afield in it, but we believe it is essential to show the working of this arbitration system, and we believe that it may very well appear at

(2537)

some stage in the consideration of this case that great consideration must be given to any improvements that may be found vital or necessary in this arbitration system, and that the Court may in some form feel desirous and feel compelled to pass on that.

J. Noble Braden—By Defendant—Direct

Q. If you please, make it as brief as you can. Do not go into too much detail. A. No. We consulted these leading citizens, ten at least in the community, in order to establish a proper panel of arbitrators. In each city we got nominees from the bar association, bankers and others, and we had their nominees fill out a questionnaire, and we had that checked by credit agencies and other sources. From that, a little over a thousand men were selected as the arbitrators in that system, the great majority of whom were members of the bar and had been nominated by the bar associations in all the 31 cities.

We selected an office and got a local representative, who was brought to New York and given a course of training of a week, under the supervision of Professor Sturges of Yale, and others, to enable him to properly administer his duties as clerk of the tribunal under the decree.

Q. To make it as brief as possible, you set up tribunals of this character in 31 cities? A. Yes.

Q. With the best arbitrators that you could find under this process that you have described to us? A. Yes.

Q. Did you have forms and such things prepared and (2538)

make them available to all exhibitors generally through the country? A. Yes, we had prepared a complete set of printed forms, demand for arbitration, submission and so forth, so they were available to exhibitors to file cases. Then, in addition, I had the privilege of speaking at a number of exhibitor conventions and telling them how to proceed to file cases under the decree.

Judge Goddard: This was all after the decree?

The Witness: Yes, sir, from November 20th on. The offices were open on February 1st and two months before that we did all that, and subsequently I spoke to exhibitor conventions, after the decree went into effect.

J. Noble Braden—By Defendant—Direct

Q. Your panel of arbitrators consists of 1,065 business and professional men, and 60 per cent of them you have described in an affidavit are leading members of the bar in the different communities? A. Yes.

Q. Have you have prepared—tell us about the Appeal Board. How did that function? A. The Appeal Board was appointed by Judge Goddard, and they had offices adjacent to ours in Rockefeller Center, and in cases in which an exhibitor or a distributor was not satisfied with the original arbitrators' award, an appeal was filed, and on the record and the briefs, the Appeal Board decided the issues.

Q. Can you tell us something about the cost of this arbitration process to complainants and to the defendants in this case, generally? A. Well, the decree provided for a \$10 filing fee for the filing of the case, and then it permitted the arbitrator to receive \$50 a day, and we had heard a great deal about small exhibitors, and we had also had a system of having volunteer arbitrators under our regular system of arbitration, so we persuaded the Government and the attorneys for the distributors to allow us to make the fee of the arbitrator \$10 a day, so that there would be the minimum of expense to an exhibitor who sought to file a case. I did make an analysis sometime ago of the actual cost of a case, taking about 40 cases at random, and we found that an exhibitor's cost was about \$48, if my memory serves me, for processing a case through arbitration.

Q. In order to avoid putting in a lot of schedules here, you have prepared schedules, and I am going to ask you whether this is substantially correct: There was a total of about 416 cases filed, as I understand it? A. Yes, sir.

Mr. Seymour: On appeal or filed?

Mr. Proskauer: All together.

The Witness: All together.

J. Noble Braden—By Defendant—Direct

Judge Goddard: With the arbitrators?

Mr. Proskauer: Yes, with the arbitrators.

(2540)

Judge Goddard: Throughout the United States?

Mr. Proskauer: Yes.

Q. Of those 301 related to clearance? A. Yes.

Q. 43 related to a question on some run? A. Yes.

Q. 21 related to a designated run? A. Yes.

Q. 19 related to clearance and some run; 20 related to clearance and a designated run; 4 to clearance, some run and designated run; three were some run and designated run; one was a charge of withholding prints; three were a charge of clearance and withholding prints; and one was a charge that they were forcing shorts, that is, forcing the exhibitor to buy shorts in some run and designated run; making a total of 116? A. 416.

Q. 416. Of those, 112 were disposed of by adjustment or settlement, and of those 112, 76 were clearance, 18 were some run, 7 were designated run, 6 were clearance and designated run? A. Three—excuse me; you are right.

Q. (Continued). Three were clearance and some run; and one each were withholding prints, and clearance and withholding prints; that left 283 cases, didn't? There seems to be a discrepancy of one there. A. There is one reopened case.

Q. We won't bother about that slight discrepancy. There were 283 awards made, as I understand it? A. Yes, sir.

(2541)

Q. And those were divided up: Relief was granted to the exhibitor in 142 clearance cases and denied to the exhibitor in 66 clearance cases? A. Yes.

Q. Relief was granted to the exhibitor in 9 some run cases and denied in 16 some run cases? A. Yes.

Q. Relief was granted to the exhibit in 6 designated run cases and denied in 7 designated run cases? A. Right.

J. Noble Braden—By Defendant—Direct

Q. Clearance and designated run, relief was granted in 7 cases and denied in 8 cases; some run and clearance, relief was granted in 9 cases and denied in 4 cases; in one case relief was granted on a claim of clearance, some run and designated run and denied in two such cases; clearance and withholding prints, relief was granted in two cases and denied in two cases; and forcing shorts, some run and designated run, relief was denied, and there was relief granted to a some run and designated run case. When you come to the Appeal Board, there were 122 appeals filed? A. Yes.

Q. And they were divided, 91 as to clearance, 9 as to some run, five as to designated run, 8 as to clearance and some run, 4 as to clearance and designated run, 3 as to clearance and some run, and designated run, and 2 were as to some run and designated run. Now, the appellate tribunal handed down 114 decisions, and of those 114 decisions, 3 were disposed of by consent in some form or other, and of the other (2542)

111, 65 granted some or all relief claimed to the exhibitor, and 46 denied relief to the exhibitor? A. That is right.

Judge Goddard: This covers the entire period since November, 1940, your figures?

The Witness: Yes, sir. It is really from February 1, 1941, when the operation started.

Q. I want to direct your attention for a moment only to those—

Judge Goddard: I would like you to bring out the effort that was made by this arbitration to avoid all possible delays. Can you tell us about that, so that prompt decisions might be had?

The Witness: Under the system there are certain rules under which each separate proceeding must be taken. There is a submission, filing of a demand, and

J. Noble Braden—By Defendant—Direct

then time for intervenors to intervene, that is theatres that might have an interest. And then out goes a list of arbitrators, within seven days, and the arbitrators are duly assigned and then our clerk keeps after the parties to fix the date of hearing.

Judge Goddard: Those decisions were quite prompt?

The Witness: Yes; they had to be made within 30 days after the close of the proceeding.

Q. The thing has worked with great dispatch, has it (2543)

not? A. In many instances. There are times when there have been delays due to the engagements of counsel in various parts of the country, and that, but on the whole, it has been pretty prompt.

Q. It is a fact, is it not, that many of these disputes were between competing independent theatres? A. There had to be, of course, a distributor defendant to bring the suit on. There were independent competing theatres intervening as parties to the arbitration, and signing submissions to be bound by the decision.

Q. So what it came down to was that competing defendants were claiming that—the competing independents were claiming—that the distributor defendant ought to favor their claims rather than the other man's claims? A. Yes.

Q. And that is the form that many of these arbitrations took? A. Yes. The principal battle in the arbitration was generally between two theatres rather than between any theatre and distributor.

Q. I want to confine our attention for a moment to those arbitrations that were confined to clearance. You had this tabulation prepared? A. Yes.

Q. It appeared to you, did it not, that there were 183 arbitrations that could be put in tabular form? A. Yes, sir.

J. Noble Braden—By Defendant—Direct

(2544)

Q. And then there were 54 remaining? A. In tabular form, but we did not have complete data.

Q. So that you made a subsequent schedule listing exactly what had happened in those 54? A. Yes, sir.

Q. And the first 14 pages of this printed document are a tabular resume—have I got the number right? A. First 14 pages is correct.

Q. Oh, yes, the first 14 pages are a tabular resume of the result of these clearance arbitrations under Section 8 of the consent decree as to those 183 arbitrations? A. Yes.

Q. And the remaining pages list what happened where you could not put it in tabular form as to the remaining 54 cases, with the exception of four that you omitted altogether? A. Yes.

Q. And you omitted those four because— A. Of insufficient data in the New York files.

Q. You did not have sufficient data in your New York files to do it.

Mr. Proskauer: I would like to mark that schedule in evidence.

Mr. Wright, have you a copy?

Mr. Wright: What number are you giving it?

Mr. Proskauer: This is everybody's. I think it ought to be marked the Government's exhibit because

(2545).

this decree resulted from Government activity and it is the most creditable thing the Attorney General's Officer ever did.

Mr. Wright: We have no objection to the exhibit or having our number on it, but we don't want to be understood as having forced it on the Court at our instance.

Colloquy

Mr. Proskauer: Oh, no, we will mark it as a general defendants'. It ought to be marked Judge Goddard's Exhibit, really.

Mr. Wright: Mark it the next Government's exhibit number.

(Marked Government's Exhibit 390.)

Mr. Proskauer: Your Honor, seriously, those of us who have worked in this industry, we just cannot say enough as to what was accomplished by this thing Judge Goddard set up here, and, to strike it down, is a terrible thing.

I would like to read into the record, without offering it as an exhibit, the following analysis of these 183 tabulated cases.

In three cases, the clearances were eliminated, which were described as following some other city.

In five cases clearances were made to depend upon admission price charged by the subsequent run.

Your Honors will find in the tabulation that we have set forth those five cases in which the arbitral

(2546). tribunals look to the question of subsequent admission price, as they were authorized by the decree to do, as an essential and important element in fixing clearance.

In 10 cases we do not try to summarize because it is so complicated.

In the others, in 86 cases, no reduction of clearance was made. That was 30 per cent of the total.

The Witness: No; complete reduction of clearance was made.

Mr. Proskauer: The award reduced clearance by no days.

The Witness: The clearance was eliminated in 86 cases.

Colloquy

(2547)

Mr. Proskauer: No, you have that wrong. You are mistaken. That is the number of cases in which no reduction was made.

The Witness: All right.

Mr. Proskauer: Get that straight. In 86 cases, or 30 per cent of the total, no reduction in clearance was made.

In 77 cases clearance was reduced by from one to seven days. That is 28 per cent of the cases.

In 44 cases, clearance was reduced by 8 to 16 days. That is 16 per cent of the cases.

In 61 cases, clearance was reduced by 17 to 30 days, that is 22 per cent.

In 9 cases, clearance was reduced by 31 to 45 days. That is three per cent of the cases.

In four instances, clearance was reduced by more than 46 days, and that is one per cent of the cases.

Of the 86 cases I referred to, where there was no reduction of clearance, there were 30 situations where the clearance that the arbitrators refused to interfere with, was seven days; 25 where the clearance was 8 to 14 days; 15 where it was 15 to 30 days; 5 where it was 42 to 49 days; 6 where it was 56 to 60 days; one where it was 75 days; one where it was 120 days after first run; one where it was 130 days after first run; one where it was 150 days after national release date.

(2548)

That about covers everything.

With Mr. Wright's permission, I will mark in evidence this affidavit of Mr. Braden's—at least I will ask to have marked in evidence this affidavit of Mr. Braden's, which contains a number of the statements he has already made and a slight amount of additional tabular information.

(Marked Defendant Warner's Exhibit W-16.)

Colloquy

Mr. Proskauer: As an example of what I said about the subsequent run price, I would like to call attention to just one or two of these: we have here No. 93 F 43, man complains against a 49-day clearance, and the arbitrators reduced the clearance to 42 days, if complainant charges 25 cents admission, and that was affirmed by the appeal board.

Here is another one where a man—this is Lewis & Company, 91 F 43—complained of a 49-day clearance and the appeal board ruling is interesting: "In the event that complainant theatre charges an adult evening admission of 35 cents, the maximum clearance shall be 35 days after first-run Los Angeles," closing, "subject, however, to the Apollo's right to a prior run and to the provision that the Apollo may be given a clearance of seven days over complainant's picture, and then follows a number of other considerations. That will indicate, I think, to your Honors what a

(2549)

complicated matter this clearance thing can be locally and how that element of admission price is with everybody, independent and affiliate alike, an element as recognized by the consent decree.

That is all, Mr. Braden.

Mr. Seymour: I have a few documentary matters I want to deal with now.

Mr. Wright, when Martin J. Mullin was on the stand, called by Paramount, you asked him some questions in connection with two arbitrations in Massachusetts, one affecting the Middleboro theatre at Middleboro, Massachusetts, and the other affecting the Playhouse at Ayer, Massachusetts, and you indicated in your questions that because of the provisions of Section 17 of the Decree, Paramount was not only

Colloquy

excused from following the awards in those cases but had not in fact followed them, and perhaps neither you nor I had an opportunity to check up on the facts. Would you be prepared to stipulate now, subject to correction, to save encumbering the record with contracts, that in connection with both arbitrations, Paramount did in fact follow the terms of the awards after the awards came down, even though not obligated to do so by reason of Section 17?

Mr. Wright: That is not the fact as reported to us by the complaining exhibitors.

(2550)

Mr. Seymour: Then I will offer the contracts. I offer first, with respect to Middleboro, a contract dated November 19, 1941, and another one dated May 28, 1942, which I believe are both before the date the arbitrators' award became final.

Mr. Wright: We have no objection.

(Marked Defendant Paramount's Exhibit P-14.)

Mr. Seymour: I am sorry I haven't got copies because I did not think I would have to offer these, but I will supply them to the Court.

I now offer a contract dated January 5, 1943, which I understand was after the arbitrators' award became final, showing the change in the clearance.

Mr. Wright: You are offering one contract?

Mr. Seymour: Yes.

Mr. Wright: You have the other contracts, have you not?

Mr. Seymour: I can supply such other contracts as there were from that time on. I state, subject to correction, that that contract, in respect to the clearance, conforms to the award and that subsequent con-

Colloquy

tracts are in the same form. If you want to have me produce for your inspection subsequent contracts, I will do so, but it does not make that contract inadmissible.

(2551) Mr. Wright: There is a serious question because

we sent out questionnaires to the complainants who had had awards, asking for this specific data, and this exhibitor reported on the questionnaire, as of this summer, that the Paramount clearance was the same that it had been before.

Mr. Seymour: I am offering a contract showing compliance with the award. I do not care what an exhibitor said in answer to a questionnaire and it does not affect that contract.

Mr. Wright: We have no objection to this contract going in but I am merely pointing out that, as far as we are concerned, it will be necessary to examine the sequence of contracts as to what was done since the award through this summer in order to determine the accuracy of inaccuracy of the representation made to us by the exhibitor.

Judge Hand: All right, it is admitted.

(Marked Defendant Paramount's Exhibit P-15.)

Mr. Seymour: I now offer two contracts, one dated November 27, 1944—both dated November 27, 1944, before the appeals board decision, affecting the Playhouse in Ayer, Massachusetts.

(Marked Defendant Paramount's Exhibit P-16.)

Mr. Seymour: I now offer a contract dated May 10, 1945, after the appeals board decision with respect to the Playhouse in Ayer.

Colloquy

(2552)

Mr. Wright: We have no objection but we likewise will want the other contracts made subsequent to the award.

Mr. Seymour: They will be made available.

(Marked Defendant Paramount's Exhibit P-17.)

Mr. Seymour: I want to offer a schedule prepared at Judge Hand's request in the course of the proceedings the other day, showing the play-off of one of the Paramount pictures, this picture being Let's Face It, and showing the staggered national play-off, indicating the theatres in which it played first-run, which are independents, and showing on its face, as the play-off went over the country, the independents and the other theatres had about the same general relation to it.

(Marked Defendant Paramount's Exhibit P-18.)

Mr. Wright: If the Court please, I should like to call your attention to the statement of clearance in the contracts that were put in evidence here as to Mr. Hodgson's situation at Middleboro: the contracts represented to be those prior to the award state this as to his clearance: first 14 days after first-run Boston; first after Brockton and Taunton.

After the award the contract P-16, which is supposed to state his clearance, he plays first after Brockton and Park, Taunton but not later than 14 days after

(2553)

first-run at Brockton or 28 days after first-run Boston, whichever is earlier. In other words, in the prior contract all he played was either—that is, after Brockton and Taunton, and 14 days after Boston; in the

Colloquy

later contract, he follows Brockton and Taunton by either 14 days or Boston by 28 days.

Mr. Seymour: My point was not the details of the clearance. My point was that Paramount with respect to these contracts complied with the terms of the award despite the fact that it was not required to do so because of the provisions of Section 17.

Now I offer a schedule showing the number of prints of Paramount feature pictures allocated to the various Paramount exchanges throughout the United States during the 1944 season, and a portion of the 1945 season, down to the time when this schedule was prepared, which was early this year; and this shows the number of prints allocated to each exchange, the number of customers served by each exchange, indicating the great difference between the number of prints available to each exchange and the number of accounts and customers which each exchange had to service with those few available prints.

(Marked Defendant Paramount's Exhibit P-19.)

(2554) Mr. Seymour: Now I offer a schedule showing the

total number of accounts to which Paramount features were licensed during the seasons 1938-39 through 1943-44, showing the variations in number of accounts from year to year.

(Marked Defendant Paramount's Exhibit P-20.)

Mr. Seymour: Perhaps I ought to state that an account does not necessarily mean only one theatre, but it is the account of an exhibitor in a particular locality. If he has several theatres it will still be one account.

Colloquy

Now I offer a schedule showing the total number of shipments of Paramount pictures by all its exchanges for each week from January 1938 to October 20, 1945, showing the variation in number of shipments week by week, and particularly the great increase of shipments during the period of sales drives which are indicated on the exhibit by the circling of the date of the week of the drive.

(Marked Defendant Paramount's Exhibit P-21.)

Mr. Seymour: Now I offer a schedule showing total United States billings on Paramount feature pictures for the seasons 1941-42, 1942-43, as of June 30, 1945, and 1943-44 as of July 14, 1945. The 1941-42 season is believed to be complete. The others would necessarily be incomplete because billings still continue for several years after a season.

(2555)

The lines on the schedule—perhaps I ought to offer it now and then I will explain the lines.

(Marked Defendant Paramount's Exhibit P-22.)

Mr. Seymour: The lines on the schedule indicate the blocks in which the pictures were licensed and show the variation in number of licenses or billings within each block. The last page, however, has a group of five pictures at the end of the page which were not dealt with as a block, the line being merely to segregate those from the former block. Those are all pictures which were licensed individually. For Whom the Bell Tolls, the last one, was one of those pictures mentioned here as having been licensed at an advanced admission price, and this represents the number of billings at the advanced price, it not having

Colloquy

been released for general exhibition during the season involved here.

Now, billing, as I think has been previously indicated during the trial, means an engagement. Occasionally, but very rarely, there are several engagements of the same picture in the same theatre, but this roughly indicates the total number of engagements in different theatres.

Now I offer a schedule showing for the calendar years 1940 to 1944, the feature film rental received by Paramount from theatres affiliated with Warner, Fox, Loew and RKO, compared with the feature film revenue received by Paramount from all other ex-

(2556)

hibitors. For the purpose of computing the percentage, Paramount pictures exhibited in the theatres in which Paramount has an interest have, of course been excluded from the percentage, although that amount is shown on the schedule. Obviously the comparison is between what is received from the so-called affiliated exhibitors and what is received from independent exhibitors. Paramount's dealings with its own theatres stand on quite a different footing, and this shows the percentage between the so-called affiliated theatres and the independent exhibitors.

(Marked Defendant Paramount's Exhibit P-23.)

Mr. Seymour: Your Honors will see on the basis of this computation as to 1944, Paramount received only 31-odd per cent of its film rentals on feature films from the distributor defendants who have an interest in theatres or from their theatres, and received 68 and a fraction per cent from other exhibitors.

Now, if your Honors want to recess, I have just got a few more which I will put in after lunch.

George A. Smith

Judge Hand: Very well. We will adjourn until two-fifteen.

(Recess until 2:15 p.m.)

(2557)

AFTERNOON SESSION

Mr. Seymour: May I proceed?

Judge Hand: Yes.

Mr. Seymour: I have here four affidavits of the division sales managers of Paramount, Mr. George A. Smith, Mr. William H. Erbb, Mr. James J. Donohue, and Mr. Hugh Owen; and counsel for the Government has stipulated that if called they would testify in accordance with these affidavits with the same force and effect as if they were actually called; and I am going to turn those over to the stenographer and ask that they be copied into the record.

(The affidavit of George A. Smith is as follows:)

"George A. Smith, being duly sworn, deposes and says:

"If I were called as a witness to testify in this action and were asked the following questions, I would make the following answers, with the same force and effect as if actually called as a witness:

"Q. Where do you reside? A. 108 East 38th Street, New York City, N. Y.

"Q. In what capacities have you been employed by Paramount? A. My first experience in the film business was in 1914 as assistant to the General Manager of the Pathe Exchange in New York City.

(2558)

I held this position until 1918 when I went into the Army. In 1919 I became General Sales Manager of Triangle Pictures, which position I held until 1920. In 1920 I became General Sales Manager of United Picture Theatres until 1921 when that company

George A. Smith

went out of business. In 1922 I was employed by Paramount. In 1924 I became Branch Manager of the Milwaukee Exchange which position I held until 1927 when I became Branch Manager of the Cincinnati Exchange. In 1934 I became Branch Manager of the San Francisco Exchange and in January, 1938 I became Assistant District Manager having supervision over the Pacific Coast Area. In 1938 I became District Manager having supervision over the same area, which position I held until March, 1941 when I became Western Division Sales Manager for Paramount with headquarters in New York.

"Q. What are your duties and what employees do you supervise? A. I am in charge of the film exchanges of Paramount located in the western part of the United States. The District Managers and the Branch Managers of these exchanges are under my supervision and are immediately responsible to me for the conduct of these exchanges and for the licensing and distribution of Paramount pictures in their respective territories.

"Q. Do you have anything to do with license

(2559)

agreements? A. All license agreements which are solicited by the salesmen and Branch Managers or District Managers of the Exchanges under my supervision are submitted to me for rejection or approval. I make periodic visits to those Exchanges to see that Paramount pictures receive proper distribution and that the license agreements are properly liquidated. The men under my supervision report to me any problems that arise in the course of negotiating licenses and I assist in their solution. I, myself, negotiate with many exhibi-

George A. Smith

tors for the licensing of Paramount pictures and I also frequently assist Branch Managers and District Managers with their negotiations.

"Q. What is the function of the Paramount distribution department? A. Its function is to negotiate licenses for and to distribute the pictures which Paramount releases. .

"Q. Do you or those under your supervision have anything to do with the supervision of the theatres in which Paramount is interested? A. No.

"Q. Do you or anyone under your supervision have anything to do with the licensing of pictures of other distributors to theatres in which Paramount is interested? A. No. Neither I nor anyone under my supervision has anything to do with the question of what pictures, other than those released by Paramount, are to be licensed for

(2560) .

exhibition in any of the theatres in which Paramount is interested.

"Q. In licensing Paramount pictures for exhibition in theatres in which any other defendant is interested, are you or your associates concerned as to whether or not that defendant as a distributor licenses or refuses to license its pictures for exhibition in any theatre in which Paramount is interested, or with the terms upon which they are licensed? A. No.

"Q. Is the distribution department concerned in any way with the matters mentioned in the last question? A. No. They are entirely beyond the function of the distribution department.

"Q. Are the various theatre companies associated with National Theatres Corporation among

George A. Smith

the accounts with which you negotiate license agreements for Paramount pictures? A. Yes.

"Q. In conducting these negotiations do you deal with the heads of the various exhibition companies associated with National Theatres Corporation at their respective headquarters? A. Yes.

"Q. With whom are the negotiations conducted? A. Elmer Rhoden in Kansas City, Ed Zabel in Los Angeles, Milt Hossfeldt in Denver and Salt Lake City, Frank Newman in Seattle, Al J. Finke in Portland, and Richard Spier in San Francisco.

(2561)

"Q. Are the negotiations with each one of those gentlemen separately conducted and wholly independent of each other? A. Yes.

"Q. Is the licensing of pictures in the field with any of these companies dependent in any way upon the success or failure of negotiations with any of the other companies? A. No.

"Q. In negotiating with the representative of the various theatre companies associated with National Theatres Corporation do you have any knowledge or information as to whether or not Twentieth Century-Fox Film Corporation is negotiating to license or has licensed Fox films for exhibition in any of the theatres in which Paramount is interested? A. No.

"Q. Is there any relation whatever between your negotiations for the licensing of Paramount pictures to and the licensing of Fox pictures for exhibition in any of the theatres in which Paramount is interested? A. No.

"Q. Do you ever refuse to license Paramount pictures to the various theatre companies asso-

George A. Smith

ciated with National Theatres Corporation unless and until any of the theatres in which Paramount is interested has offered or concludes licenses for the pictures of Twentieth Century-Fox Film Corp.?
A. No.

(2562)

"Q. Do you ever conduct negotiations for the licensing of Paramount pictures for exhibition in the theatres in which Paramount has an interest with Leonard H. Goldenson or any member or employee of the Theatre Department of Paramount.
A. No.

"Q. With whom are such negotiations conducted? A. They are always conducted with the local representative of the company operating the theatres in each particular situation.

"Q. Except for the individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, do you have any agreement or understanding with any distributor with respect to whether you or Paramount will or will not license the exhibition of Paramount pictures to any exhibitor, or as to the terms, including the terms as to run and clearance upon which Paramount pictures will be licensed to any exhibitor?
A. No.

"Q. With the same exception do you have any agreement with any distributor as to the admission prices which are charged or to be charged by any exhibitor, whether affiliated with any defendant or not? A. No.

"Q. With the same exception do you communicate to any distributor the terms upon which you

William H. Erbb

or Paramount have licensed or will license the exhibition of Paramount pictures to any exhibitor, whether affiliated or not? A. No:

(2563)

"Q. Do you receive any information as to the terms upon which other distributors have licensed or will license their pictures to any exhibitor, whether affiliated or not? A. No.

(Sgd.) George A. Smith."

(The affidavit of WILLIAM H. ERBB is as follows:)

"WILLIAM H. ERBB, being duly sworn, deposes and says:

"If I were called as a witness to testify in this action and were asked the following questions, I would make the following answers, with the same force and effect as if actually called as a witness:

"Q. Where is your place of business? A. 1501 Broadway, New York City, N. Y.

"Q. In what capacities have you been employed by Paramount? A. I started in the motion picture business as a salesman in 1920 for the Superior Film Exchange in Philadelphia, Pa., which position I held until 1922. I joined Paramount in 1922 as a salesman in the New Haven Exchange. In 1924 I became Branch Manager of the Portland, Maine, Exchange and in May, 1924 I was made Branch Manager of the Boston, Mass. Exchange, which position I held until November, 1932 when I became District Manager of the

(2564)

Northeast part of the United States with head-

William H. Erbb

quarters in Boston. I held this position until June 12, 1944 when I became Eastern Division Manager for Paramount with headquarters in New York.

"Q. What are your duties and what employees do you supervise? A. I am in charge of the film exchanges of Paramount located in Massachusetts, upper New York State, Connecticut, Philadelphia, Washington and Pittsburgh. The District Managers and Branch Managers of these exchanges are under my supervision and are immediately responsible to me for the conduct of these exchanges and for the licensing and distribution of Paramount pictures in their respective territories.

"Q. Do you have anything to do with license agreements? A. All license agreements which are solicited by the salesmen and Branch Managers or District Managers of the exchanges under my supervision are submitted to me for rejection or approval. I make periodic visits to those exchanges to see that Paramount pictures receive proper distribution and that the license agreements are properly liquidated. The men under my supervision report to me any problems that arise in the course of negotiating licenses and I assist in their solution. I, myself, negotiate with many exhibitors for the licensing of Paramount pictures

(2565)

and I also frequently assist Branch Managers and District Managers with their negotiations.

"Q. What is the function of the Paramount distribution department? A. Its function is to negotiate licenses for and to distribute the pictures which Paramount releases.

William H. Erbb

"Q. Do you or those under your supervision have anything to do with the supervision of the theatres in which Paramount is interested? A. No.

"Q. Do you or anyone under your supervision have anything to do with the licensing of pictures of other distributors to theatres in which Paramount is interested? A. No. Neither I nor anyone under my supervision has anything to do with the question of what pictures, other than those released by Paramount, are to be licensed for exhibition in any of the theatres in which Paramount is interested.

"Q. In licensing Paramount pictures for exhibition in theatres in which any other defendant is interested, are you or your associates concerned as to whether or not that defendant as a distributor licenses or refuses to license its pictures for exhibition in any theatre in which Paramount is interested, or with the terms upon which they are licensed? A. No.

"Q. Is the distribution department concerned in any way with the matters mentioned in the last

(2566) question? A. No. They are entirely beyond the function of the distribution department.

"Q. Are companies associated with Warner Bros. Pictures, Inc. one of the accounts with which you negotiate license agreements for Paramount pictures? A. Yes.

"Q. Are those negotiations conducted in association with Charles M. Reagan, the General Sales Manager of Paramount? A. Yes.

"Q. With whom are the negotiations conducted? A. Clayton Bond.

William H. Erbb

"Q. In negotiating with the representative of Warner Bros. to whom you have referred, do you have any knowledge or information as to whether or not that company as a distributor is negotiating to license or has licensed the films of its company for exhibition in any of the theatres in which Paramount is interested? A. No.

"Q. Is there any relationship whatever between your negotiations for the licensing of Paramount pictures to companies associated with Warner Bros. Pictures, Inc. and the licensing of the pictures of that defendant for exhibition in any of the theatres in which Paramount is interested? A. No.

"Q. Do you ever refuse to license Paramount pictures to companies associated with Warner Bros. Pictures, Inc. unless and until any of the theatres in which Paramount is interested has

(2587)

offered or concludes licenses for the pictures of that defendant as a distributor? A. No.

"Q. Do you ever conduct negotiations for the licensing of Paramount pictures for exhibition in the theatres in which Paramount has an interest with Leonard H. Goldenson or any member or employee of the Theatre Department of Paramount? A. No.

"Q. With whom are such negotiations conducted? A. They are always conducted with the local representative of the company operating the theatres in each particular situation.

"Q. Except for the individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, do you have any agreement or

James J. Donohue

understanding with any distributor with respect to whether you or Paramount will or will not license the exhibition of Paramount pictures to any exhibitor, or as to the terms, including the terms as to run and clearance upon which Paramount pictures will be licensed to any exhibitor?

A. No.

"Q. With the same exception do you have any agreement with any distributor as to the admission prices which are charged or to be charged by any exhibitor, whether affiliated with any defendant or not? A. No.

(2568)

"Q. With the same exception do you communicate to any distributor the terms upon which you or Paramount have licensed or will license the exhibition of Paramount pictures to any exhibitor, whether affiliated or not? A. No.

"Q. Do you receive any information as to the terms upon which other distributors have licensed or will license their pictures to any exhibitor, whether affiliated or not? A. No.

(Signed) William H. Erbb,"

(2569)

(The affidavit of James J. Donohue is as follows):

"JAMES J. DONOHUE, being duly sworn, deposes and says:

"If I were called as a witness to testify in this action and were asked the following questions, I

James J. Donohue

would make the following answers, with the same force and effect as if actually called as a witness:

"Q. Where do you reside? A. 10 Gracie Square, New York City, N. Y.

"Q. In what capacities have you been employed by Paramount? A. My first connection with the motion picture business was with Paramount in 1925 as an assistant shipper in San Francisco. In six months I was promoted to assistant booker in the same office. One year later I was promoted to booking manager in that office and after two years I became a salesman. After having been a salesman for two years I was transferred to the Portland, Oregon Exchange as salesman, which position I held for about two years. From 1932 to 1934 I was branch manager of the Salt Lake City Exchange and from 1934 to 1937 branch manager of the Minneapolis Exchange. In 1937 I became branch manager of Chicago and held that position until 1942 when I was promoted to district manager in charge of Dallas, Oklahoma City and Memphis. In June, 1944, I was promoted to the position of Central Division Manager, with head-

(2570)

quarters in New York, which position I now hold.

"Q. What are your duties and what employees do you supervise? A. I am in charge of the film exchanges of Paramount located in certain of the Middle West States as well as Dallas, Texas, Oklahoma City, Oklahoma and Memphis, Tennessee. The district managers and the branch managers of these exchanges are under my supervision and are immediately responsible to me for the conduct of these exchanges and for the licensing and distribution of Paramount pictures in their respective territories.

James J. Donohue

"Q. Do you have anything to do with license agreements? A. All license agreements which are solicited by the salesmen and branch managers or district managers of the exchanges under my supervision are submitted to me for rejection or approval. I make periodic visits to those exchanges to see that Paramount pictures receive proper distribution and that the license agreements are properly liquidated. The men under my supervision report to me any problems that arise in the course of negotiating licenses and I assist in their solution. I, myself, negotiate with many exhibitors for the licensing of Paramount pictures and I also frequently assist branch managers and district managers with their negotiations.

"Q. What is the function of the Paramount distribution department? A. Its function is to ne-

(2571)

gotiate licenses for and to distribute the pictures which Paramount releases.

"Q. Do you or those under your supervision have anything to do with the supervision of the theatres in which Paramount is interested? A. No.

"Q. Do you or anyone under your supervision have anything to do with the licensing of pictures of other distributors to theatres in which Paramount is interested? A. No. I do not negotiate or have anything to do with the negotiating of any license for the exhibition of Paramount pictures in any of the theatres in which any of the other defendants are interested.

"Q. Do you ever conduct negotiations for the licensing of Paramount pictures for exhibition in the theatres in which Paramount has an interest

James J. Donohue

with Leonard H. Goldenson or any member or employee of the Theatre Department of Paramount?
A. No.

"Q. With whom are such negotiations conducted? A. They are always conducted with the local representative of the company operating the theatres in each particular situation.

"Q. Except for the individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, do you have any agreement or understanding with any distributor with respect to whether you or Paramount will or will not

(2572)

license the exhibition of Paramount pictures to any exhibitor, or as to the terms, including the terms as to run and clearance upon which Paramount pictures will be licensed to any exhibitor?
A. No.

"Q. With the same exception do you have any agreement with any distributor as to the admission prices which are charged or to be charged by any exhibitor, whether affiliated with any defendant or not? A. No.

"Q. With the same exception do you communicate to any distributor the terms upon which you or Paramount have licensed or will license the exhibition of Paramount pictures to any exhibitor, whether affiliated or not? A. No.

"Q. Do you receive any information as to the terms upon which other distributors have licensed or will license their pictures to any exhibitor, whether affiliated or not? A. No.

(Sgd) JAMES J. DONOHUE."

Hugh Owen

(2573)

(The affidavit of HUGH OWEN is as follows:)

"HUGH OWEN, being duly sworn, deposes and says:

"If I were called as a witness to testify in this action and were asked the following questions, I would make the following answers, with the same force and effect as if actually called as a witness:

"Q. Where do you reside? A. Hotel Pierre, New York City, N. Y.

"Q. In what capacities have you been employed by Paramount? A. From January 1924 until June 1927 I was employed as a Branch Manager respectively of the Charlotte and Cincinnati Exchanges. From 1927 until 1941 I was out of Paramount's employ and employed by Western Electric as District Sales Manager and United Artists Corp. as District Manager in the South. From January 1941 to June 9, 1944 I was employed by Paramount as District Manager and later as Eastern Sales Manager. From June 1944 until February 5, 1945 I was employed by Vanguard Films Inc. as General Sales Manager. Since February, 1945 I have been New York and Southern Division Manager of Paramount.

"Q. What are your duties and what employees do you supervise? A. I am in charge of the film exchanges of Paramount located in New York and in the southeastern part of the United States. The District Managers and the Branch Managers of these exchanges are under my supervision and are immediately responsible to me for

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the conduct of these exchanges and for the licens-

Hugh Owen

ing and distribution of Paramount pictures in their respective territories.

"Q. Do you have anything to do with license agreements? A. All license agreements which are solicited by the salesmen and Branch Managers or District Managers of the exchanges under my supervision are submitted to me for rejection or approval. I make periodic visits to those exchanges to see that Paramount pictures receive proper distribution and that the license agreements are properly liquidated. The men under my supervision report to me any problems that arise in the course of negotiating licenses and I assist in their solution. I, myself, negotiate with many exhibitors for the licensing of Paramount pictures and I also frequently assist Branch Managers and District Managers with their negotiations.

"Q. What is the function of the Paramount distribution department? A. Its function is to negotiate licenses for and to distribute the pictures which Paramount releases?

"Q. Do you or those under your supervision have anything to do with the supervision of the theatres in which Paramount is interested? A. No.

"Q. Do you or anyone under your supervision have anything to do with the licensing of pictures of other distributors to theatres in which Para-

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mount is interested? A. No. Neither I nor anyone under my supervision has anything to do with the question of what pictures, other than those released by Paramount, are to be licensed for ex-

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hibition in any of the theatres in which Paramount is interested.

"Q. In licensing Paramount pictures for exhibition in theatres in which any other defendant is interested, are you or your associates concerned as to whether or not that defendant as a distributor licenses or refuses to license its pictures for exhibition in any theatre in which Paramount is interested, or with the terms upon which they are licensed? A. No.

"Q. Is the distribution department concerned in any way with the matters mentioned in the last question? A. No. They are entirely beyond the function of the distribution department.

"Q. Is Loew's, Inc. one of the accounts with which you negotiate license agreements for Paramount pictures? A. Yes.

"Q. Are those negotiations conducted in association with Charles M. Reagan, the General Sales Manager of Paramount? A. Yes.

"Q. With whom are the negotiations conducted? A. Joseph Vogel represents Loew's Inc. with respect to the theatres in which Loew is in-

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terested outside of the City of New York and Charles Moskowitz represents Loew's with respect to the theatres in which Loew's is interested in the City of New York.

"Q. Are the negotiations with Mr. Vogel and Mr. Moskowitz separately conducted and wholly independent of each other? A. Yes.

"Q. Is the licensing of pictures in the field where Mr. Moskowitz represents Loew's, Inc. dependent in any way upon the success or failure of

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negotiations with respect to the field in which Mr. Vogel represents Loew's, Inc.? A. No.

"Q. Do you also conduct negotiations for the licensing of Paramount pictures for exhibition in the theatres in which the defendant R. K. O. is interested? A. Yes.

"Q. With whom are those negotiations conducted? A. With Harold Mirisch, representing R. K. O.

"Q. In negotiating with the representatives of Loew's, Inc., to whom you have referred, or with the representative of R. K. O., do you have any knowledge or information as to whether or not those companies as distributors are negotiating to license or have licensed the films of their respective companies for exhibition in any of the theatres in which Paramount is interested? A. No.

(2577) "Q. Is there any relationship whatever between

your negotiations for the licensing of Paramount pictures for exhibition in the theatres in which Loew's Inc. is interested or in the theatres in which R. K. O. is interested and the licensing of the pictures of either of those defendants for exhibition in any of the theatres in which Paramount is interested? A. No.

"Q. Do you ever refuse to license Paramount pictures for exhibition in the theatres in which Loew's Inc. or R. K. O. are respectively interested unless and until any of the theatres in which Paramount is interested has offered or concludes licenses for the pictures of either of those distributors. A. No.

"Q. Do you ever conduct negotiations for the licensing of Paramount pictures for exhibition in

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the theatres in which Paramount has an interest with Leonard H. Goldenson or any member or employee of the Theatre Department of Paramount?

A. No.

"Q. With whom are such negotiations conducted? A. They are always conducted with the local representative of the company operating the theatres in each particular situation.

"Q. Except for the individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, do you have any agreement or understanding with any distributor with respect

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to whether you or Paramount will or will not license the exhibition of Paramount pictures to any exhibitor, or as to the terms, including the terms as to run and clearance upon which Paramount pictures will be licensed to any exhibitor?

A. No.

"Q. With the same exception do you have any agreement with any distributor as to the admission prices which are charged or to be charged by any exhibitor, whether affiliated with any defendant or not? A. No.

"Q. With the same exception do you communicate to any distributor the terms upon which you or Paramount have licensed or will license the exhibition of Paramount pictures to any exhibitor, whether affiliated or not? A. No.

"Q. Do you receive any information as to the terms upon which other distributors have licensed or will license their pictures to any exhibitor, whether affiliated or not? A. No.

(Signed) HUGH OWEN."

Colloquy

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Mr. Seymour: In addition, although it is not embraced in these affidavits, I understand that Government counsel will stipulate that if asked the questions which were agreed to for Loew this morning on the stipulation read by Mr. Davis, that is, the questions negating agreement, conspiracy or concert of action as to Paramount, that they would answer in the negative as the division managers of Loew answered the same questions in the negative on that stipulation; and also that they would answer in the negative the questions negating conspiracy which were asked of Mr. Zukor.

I understand that is stipulated?

Mr. Wright: So stipulated.

Mr. Seymour: Now, I have an additional affidavit by Mr. James J. Donoghue which was submitted on the motion for temporary injunction in this case before Judge Goddard; and I should like to have that also transcribed because it is stipulated between ourselves and the Government that in addition to the testimony in the former affidavit referred to, Mr. Donoghue would also testify in accordance with this affidavit with the same force and effect as if called. There is referred to in the affidavit an exhibit which I have offered separately as Defendant's Exhibit P-19, and, accordingly, that is no longer attached to the affidavit, since it is otherwise in the record; and I

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shall ask the stenographer to copy this affidavit into the record.

Mr. Wright: It seems to me that this last affidavit is already a part of the noticeable record of the Court in this proceeding. I do not think it needs to be physically recopied.

James J. Donohue

Mr. Seymour: I think it would be more convenient and accessible to have it in the stenographic transcript.

(The affidavit of JAMES J. DONOHUE is as follows:)

~~"JAMES J. DONOHUE, being duly sworn, deposes and says:~~

"If called as a witness for the defendants upon the Government's application I would testify as follows:

"I reside in New York City.

"I am at present employed by Paramount Pictures Inc. (hereinafter for convenience referred to as Paramount) in the capacity of Central Division Sales Manager, which division embraces the following exchanges of this company: Cleveland, Detroit, Indianapolis, Cincinnati, Chicago, Milwaukee, Minneapolis, Dallas, Oklahoma City, Memphis.

"I have been employed in the Distribution Department of Paramount or its predecessor companies for over twenty years. I began my career in the motion picture business with Paramount in 1925 as assistant shipping clerk at its San Francisco Exchange, a position which I occupied for

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six months. I was then promoted to the position of assistant booker in that exchange and held that position for one year.

"I was then promoted to be the booking manager at that exchange and held that position for two years. I then became a salesman and worked out of that exchange for two years, at the end of

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which time I was transferred to the Portland, Oregon Exchange as salesman and worked there for about two years.

"In 1932 I was promoted to the position of Branch Manager of its Salt Lake City Exchange, a position which I occupied from 1932 to 1934. I was then promoted to the Minneapolis exchange as Branch Manager thereof and occupied that position from 1934 to 1937. In 1937 I was promoted to the branch managership of the Chicago Exchange and occupied that position until 1942. I was then promoted to be District Manager of the Dallas territory and had charge in that capacity of three exchanges, namely, Dallas, Oklahoma City and Memphis. In June 1944 I was promoted to the position of Central Division Manager, a position which I now hold. My superior in the Distribution Department of Paramount is Charles M. Reagan, its Vice-President and General Sales Manager.

"In my capacity as Central Division Sales Manager I have supervision of the exchanges

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named above and of the personnel thereof. Each of the ten branch managers of those exchanges and three District Managers are under my direct supervision and are immediately responsible to me for the conduct of those exchanges and the distribution of Paramount pictures in their respective territories.

"All license agreements that are solicited by the salesmen and branch managers of the various exchanges under my supervision are submitted to me for rejection or approval. I make periodic visits to these exchanges to see that our pictures receive

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proper distribution and that the license agreements made are properly liquidated. The men under my supervision report to me any problems that arise and I assist them in their solution. I negotiate with many exhibitors and assist Branch Managers and District Managers in their negotiations for the licensing of our pictures to exhibitors, particularly the more important and also the more difficult accounts.

"I have read the application of the United States for an order enjoining the defendants from granting 'unreasonable clearance' in licensing feature films distributed by them, and I have read the memorandum in support of its application for temporary relief with respect to 'unreasonable clearance.'

"'Clearance' is the period of time (fixed by

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agreement between a distributor and an exhibitor) which must elapse before a picture may be exhibited in a theatre after the conclusion of a prior exhibition in another theatre.

"'Run' is the period during which a picture is actually exhibited or during which an exhibitor has the right under his license agreement to exhibit it.

"The subjects of run and clearance are very important and complex. A proper understanding thereof requires a knowledge of the motion picture industry and an explanation of the history, nature, character, necessity and the manner in which runs and clearance operate.

"From the very inception of feature motion pictures, pictures have been licensed for successive runs with clearance between the successive runs,

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and in so licensing pictures, run and clearance are always among the elements considered in arriving at the license fee or the film rental, as it is sometimes called, agreed to be paid by the exhibitor to the distributor for the privilege of exhibiting the picture.

"I would testify that:

"Ever since I have been engaged in the business of distributing motion pictures, clearance has been a very important consideration in the licensing of motion pictures, from the standpoint of both the distributor and the exhibitor.

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"A feature motion picture is one of approximately 5,000 feet or more in length and tells a complete and continuous story which is depicted by projecting the images on the film upon the screen.

"Feature motion pictures are produced principally in California. Those produced and distributed by Paramount cost from \$200,000 to \$3,000,000 or more. These features are photographed upon what is known as a negative or a negative film. The production cost is frequently referred to as the negative cost.

"The negative film is developed in a film laboratory and as many copies of the negative are made or struck off as the producer believes it can economically make and serve to its customers or licensees properly. These copies are known as positives or positive prints.

"The average cost of a single positive print of a picture that is produced in 'black and white' varies from approximately \$150. to \$300. or even more, depending upon the length of the feature pic-

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ture. The cost of a print in technicolor will average from \$600. to as much as \$850. or more, again depending upon the length of the print of the particular feature picture.

"The cost of these prints, whether in black and white or technicolor, represents the expense of the raw stock or film and the cost of developing or

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striking off the single print, exclusive of the cost of producing the negative.

"In normal times and in the absence of government restrictions the number of positive prints made by Paramount of a feature motion picture generally varies from approximately 190 to 325; depending upon the popular appeal of the particular picture.

"Under the latest regulations of the War Production Board the distributors, including Paramount, will be limited to a maximum of 285 positive prints on any single picture and may not produce more than that maximum number, regardless of how popular a particular feature motion picture might be.

"There are between 16,000 and 17,000 motion picture theatres in the United States. Paramount serves as many as 10,000 to 13,000 of these theatres. The number that it serves varies according to the popularity of a particular picture.

"These 190 to 325 positive prints which Paramount makes of a given picture are allotted among its 31 film exchanges located in the principal cities of the United States. The number allocated to each of these film exchanges is predetermined according to the size and importance of the area serviced by the film exchange and the number

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of accounts it will serve. Thus, for example, the film exchange at New York City will receive from 13 to 30 prints of a picture, the number depending upon the particular public appeal and the popularity of the picture. These will be used to serve the theatres in the New York exchange territory. The Boston film exchange receives between 8 and 14 prints; the Chicago exchange from 9 to 13, and so on. Each exchange will receive its allotment or quota of positive prints for the service of its customers.

"If called to testify, I would produce, for the purpose of illustration, a chart such as the one attached hereto marked Schedule A, which would show the total number of regularly assigned prints, the approximate number of accounts served by each exchange in the United States in respect of each of the pictures released by Paramount during the season 1943-44 and the pictures released so far during the 1944-45 season. This chart shows in addition the number of extra prints which are used to take care of 'peak loads.' These prints are kept in a central depot and are used to supply the various exchanges with some of these extra prints for temporary use in order to take care of those periods in a particular exchange when the bookings are particularly heavy and close together. These periods are referred to as the

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'peak load' periods. After these prints have served their temporary purpose they are returned to the central depot for temporary use in other film exchanges. Occasionally, in addition to these emergency prints, the film exchanges borrow prints

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from one another to help out in emergencies, when none are available at the central depot.

"I would testify that ordinarily a positive print is used to serve from 35 to 50 theatres. After a theatre completes the exhibition of a picture the positive print thereof is returned to the exchange from whence it came. Before shipping the print to another exhibitor the print is thoroughly inspected by trained inspectors and necessary repairs are made so that when it is projected at the next theatre it serves the same purpose as a new print. This process is repeated after each subsequent use of the print in each succeeding theatre where the picture is shown.

"I would show as the reasons why no company produces as many prints as there are theatres desiring to show a picture so as to permit all theatres to show a picture at the same time—first, that the cost of making 10,000 to 13,000 prints would be between \$1,500,000. and \$3,900,000. for black and white prints, and from \$3,000,000. to

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\$9,000,000. for technicolor prints. No motion picture, however successful, could absorb so staggering a cost of prints besides the cost of the production itself. Hence, the number of prints must be limited if a motion-picture producer is to stay in business; second, about 75% of the motion picture theatres in the United States which Paramount serves, pay for the license to exhibit a motion picture which cost several millions dollars to produce without considering the cost of the positive prints, a sum less than the cost of a print and in many cases as little as \$10. and \$15. for a two day exhibition. Obviously, no producer could,

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under these circumstances, supply a new print costing \$150. to \$300. in the case of black and white prints or \$600. to \$850. for a technicolor print, to each exhibitor. It is therefore necessary to use a print over and over again to get back the cost of the positive print alone; third, even if it were possible to have available a sufficient number of prints to enable a substantially larger number of theatres to play a picture simultaneously, good business judgment would dictate against such a policy and pictures would still be licensed upon the basis of successive runs with clearance periods between them.

"The full earning power of a picture could not be realized by one simultaneous exhibition of the

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picture in the 10,000 to 13,000 theatres located in various parts of the United States. If that were to occur, the motion picture public desiring to see a particular picture would all have to see it within the space of time that the picture was shown. The life of the picture would thus be very short and the public would have to view it within that ~~short space of time~~ or forever miss the opportunity to see it. Thus the earning possibilities of a motion picture would be limited since its potentialities would have to be tapped quickly and in a short space of time.

"All people cannot or do not wish to see a picture at the same time. Some would like to stay home and listen to the radio; others would like to attend a concert or play bridge or attend to some household or business duty. It is for that reason that it is more advantageous to the producer, the distributor and the exhibitor not to show a given picture simultaneously in all theatres, for the

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patronage would be divided and the best results would not be obtained financially under such a condition.

"Moreover, all theatres are not of the same size, character, appointments and location, and are therefore not all equally capable of attracting patronage and earning revenue. The larger and more luxurious theatres, under conditions of simul-

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taneous exhibition, would attract the greatest amount of business with little or no business left for the smaller, less luxurious theatres competing with one another for the patronage of the public, for the same picture at the same time. Theatres located in the rural and remote sections of the country would know little about these pictures for they would not have had the benefit of the advertising and exploitation afforded to the picture by the exhibitors who exhibited them previously, and the picture would be gone and forgotten very shortly after its exhibition life started. No continued interest would be aroused by the continuity of advertising and exploitation which are afforded motion pictures by long, continuous and successive exhibitions.

"Another condition which might result if a large number of theatres were to exhibit a picture simultaneously, and thus create to a greater or lesser degree, a division of the patronage would be a tendency to make for smaller theatres and a shorter exhibition period. The tendency would also be toward less expensive and less attractive theatres.

"The cost of producing would have to be greatly curtailed and the outstanding pictures of today

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which cost such huge sums to produce could not be made.

(2591) "For all of the foregoing reasons, experience

has shown and sound economics demand a system of distributing motion pictures under which pictures would be shown successively in the theatres of a community rather than simultaneously. Thus the concept of run and successive runs had their beginning in the industry. The first time a picture is shown in a community it is 'first run'. Thereafter it is 'second run', 'third run', 'fourth run', and so on with each successive run.

"I would show the reasons why a distributor must and does give consideration to the choice of the theatres in which each run will be licensed. With the number of prints necessarily limited, the distributor must employ the ones it has wisely and in such a way as will make for the greatest return in revenue therefrom. To accomplish this, it must choose the exhibitor who has the largest, the best located and the best appointed theatres for showing the picture, so that the picture can be shown to the best advantage, can earn large sums at the box office and thereby pay the greatest revenue to the distributor. The picture, when shown for the first time, has the greatest amount of novelty and has the greatest amount of potential patronage.

(2592) "The public or a portion of the public is willing to see the picture while it is new and it is willing to pay a higher admission price for this privilege.

Accordingly, the admission prices for the theatres showing the picture on the first run are generally

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the highest and they generally decrease with each succeeding run.

"All of the members of the motion picture public are not willing to pay the same prices for their entertainment. Some prefer to see a picture while it is new, at a higher admission price, at the finest theatre. Others prefer not to see it in the large downtown theatres but prefer to see it in the later runs, closer to their homes, at lower admission prices.

"All theatres have not the same business potentialities. All are not able to pay the same license fee to the distributor. About 75% of the theatres in the United States individually pay license fees that are very much less than the cost of the positive print, not to mention the production cost. Some pay as little as \$10 to \$15 for the license to show a picture for two days and these theatres charge a very low admission price.

"The ultimate objective of the distributor is to distribute the pictures in such a manner as to be able to earn the greatest aggregate license fees from a community, and to achieve this result it must allocate its runs in each competitive area in such a manner as will be conducive to obtaining for the distributor the best results.

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"Since the first run generally is the most valuable run and an earlier run more valuable than a later run, it is important to have each run take place in the theatre or theatres which are capable of returning the greatest possible revenue from that run. Among the factors to be considered, as the proof would indicate, are seating capacity,

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physical attractiveness, location, the available source of patronage, the policy of operation, the admission price charged, the showmanship and advertising put into a picture and the reliability of the exhibitor.

"The theatres showing a picture on the first and early runs spend considerable amounts of money to advertise it in newspapers, magazines, window cards, bill-boards in strategic locations and by other means to bring the picture to the attention of the public and to attract for it the widest patronage. This is not only of great value to the exhibitor who carries on such an advertising campaign but is of great benefit to the distributor because its revenue at that theatre will be increased by such advertising. Just as important as is this revenue, is the enhancement of the value of the picture for subsequent runs if it has a run at an important theatre and is properly and extensively advertised. The exhibitors who exhibit it on subsequent runs benefit from this advertising and the advertising by word of mouth from those who have

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seen the picture in the earlier run. Subsequent run exhibitors capitalize on this advertising and spend little money in advertising the picture themselves.

"I would testify along the foregoing lines to explain the concept of run and its significance in the motion picture industry. Run is the particular period of time during which the exhibitor has been licensed to exhibit pictures and his playing position in the sequence of runs. The net result of sequence of runs from the first to the last run is that some theatres will exhibit pictures ahead of

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others. In the absence of further factors this would mean that immediately upon the conclusion of the exhibition of a picture on the first run, the second run would be entitled to commence the exhibition of that picture.

"For example, if theatre A, the first run theatre, exhibits a picture on Friday, Saturday and Sunday, theatre B, the second run theatre, would have the right under its license to commence exhibition of that same picture on Monday. Under such circumstances, the value of the first run to theatre A, as opposed to the second run for theatre B would not be appreciably greater. A substantial part of theatre A's potential audience would wait, knowing that the same picture would be seen the very

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next day at theatre B.

"To protect the exclusiveness for the limited period of the run licensed, there arose from the very inception of feature motion pictures the practice known as 'clearance' in the industry. By means of clearance the distributor agrees that it will not permit another theatre to exhibit the same picture until a specified time has elapsed after the conclusion of the prior theatre's run. It is one of the terms and conditions of the license agreement between the distributor and the exhibitor and results from negotiation between them.

"Clearance is of benefit to the distributor and the exhibitor. If the exhibitor is going to be able to pay the license fees which a distributor expects and should get from him for the earlier run, he must be able to earn it through the patronage which he can attract. His patronage will be less if a competing theatre shows the picture simul-

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taneously, immediately after or soon after the completion of the prior run. This is true whether the picture is shown subsequently at the same or a lower admission price. But as is more frequently the case, the subsequent runs usually charge progressively lower admission prices down to as little as ten or fifteen cents. The exhibitor negotiating

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for a prior run, therefore, requests from the distributor not only priority of run but a reasonable period of clearance, that is, a period during which the picture will not again be shown in a competitive theatre. It is to the interest of the distributor to grant this clearance in order to enable the exhibitor to pay the license fees demanded.

"Frequently the license fees are predicated upon a percentage of the gross receipts. Sometimes they are a fixed flat sum of so many dollars. In the case of percentage, the distributor has a direct interest in the receipts of the box office, for his license fees are directly measured thereby. But even in the case of the flat sum, it represents a sum which approximates the earning potentialities of the theatre. If the theatre does not take in a sufficient sum at the box office the exhibitor will not be able to afford to pay the fixed sums which he has agreed to pay. Therefore the distributor is willing to grant clearance which in its judgment will enable its licensees to pay the agreed license fees.

"The appropriate clearance period is not capable of exact measurement. The exhibitor requesting it usually wants a longer period of time than the distributor is willing to give. The distributor is mindful of the revenue which it will

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earn from first runs but it is desirous also of earning the greatest amount of revenue from all runs so as to operate its business on a profitable basis. The loss from first runs resulting from too little clearance may not be recouped by the over-all revenue from the subsequent runs.

"Conversely, the added revenue gained from first runs, where a longer period of clearance is granted, may not compensate the distributor for the resulting loss from subsequent runs. Adjustment of clearance to derive the most revenue from both prior and subsequent runs involves the exercise of experienced business judgment. As in all such matters, there is of course room for honest error in judgment.

"Clearance which is too short can affect over-all revenue as well as can clearance which is too long, and it will not do to over-simplify the problem by assuming that by denying the proper amount of clearance to the prior run the distributor will automatically recoup any resulting loss of revenue by a corresponding increase in revenue from subsequent runs. The revenue from subsequent runs in its totality may not be sufficient to compensate for the loss of the revenue of the prior run occasioned by or resulting from too short a period of clearance. The problem confronting the distributor is not a simple one.

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"In arriving at a judgment as to the appropriate clearance, there are taken into consideration the various factors which are enumerated in Section VIII of the Consent Decree, such as size, location, competition, film rentals, policy of operation

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and others relating to the theatres involved. No one factor is controlling.

"Through the consideration of these factors the proper clearance is arrived at which will protect the value of the run licensed without unduly diminishing the value of the picture through the succeeding runs. It is to the interest of the distributor that the value of the picture to the succeeding runs be not unduly diminished because it requires the revenue not only of the prior but of the subsequent runs as well, to make the distributor's business a profitable one.

"Through the practice of runs and clearance in the industry the distributor is able to earn the greatest revenue and to enable it to pay the huge cost of producing worthwhile motion pictures. The exhibitor is able to operate his theatre profitably and to pay the license fees according to the run for which he has contracted.

"The foregoing testimony would show the mechanics of the business and some of the sta-

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tistics as to production cost of a picture, the cost of prints, the number thereof produced and the number of theatres served. It would show what all of this means to the public and the industry. It means this: A picture which cost \$4,000,000 to produce can be seen on the earliest run at the large de luxe theatres at an admission price of from fifty cents to one dollar and on later runs in the same city at progressively lower prices down to as little as ten or fifteen cents. It means that the public in the most remote hamlet of the United States can see this great picture for as little as ten, fifteen, twenty or twenty-five cents. Without this sys-

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tem of run and clearance such magnificent theatres as the Music Hall, Paramount and other theatres like them would not be possible.

"It means that each exhibitor can license this picture at the price within his reach so that he may exhibit it to his patrons at an admission price within their reach. This picture which cost so much to produce, the exhibitor may obtain for exhibition to his public for a fee of as little as \$10 or \$15. It would be impossible for the producer to produce such pictures were it not for the large sums paid by the prior runs for the privilege of showing the same picture, nor would it be possible to license them to the later runs for such trivial sums. It would not be possible for some people to see this picture at ten or fifteen cents if the patrons

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of the prior runs did not pay a much larger sum for the privilege of seeing the same picture earlier.

"All of these benefits to the public, to the exhibitor and to the distributor are made possible by exhibiting pictures on the basis of run and clearance. By this means the public is benefited because it is able to see the best and most worthwhile pictures costing millions to produce. They are able to see them at any theatre which they choose, whenever they choose, and at an admission price which is within the means of every economic level of the community.

"The Consent Decree provides that controversies arising upon the complaint of an exhibitor that the clearance applicable to his theatre is unreasonable shall be subject to arbitration. The arbitrator takes into consideration the factors which are there enumerated and to which I have referred above.

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"Since it is impossible to measure clearance with precision and since men in the industry who deal with the subject and are most familiar with it may have granted clearance which is too long in point of time or too extensive as to area, the arbitration machinery was devised so that an impartial arbitrator could review the business judgment of those who negotiated and granted such

(2601)

clearance.

"The arbitrator hears all of the facts and considers all of the factors involved in the particular case before him; and determines therefrom whether or not the clearance granted is too long as to time or too extensive as to area. His function is to review the business judgment of the men in the industry. From his determination an appeal can be taken to the Appeal Board. No machinery, in my judgment, could be set up which is fairer than that.

"The Government, however, in its application for temporary relief and in its memorandum submitted in support thereof claims that the Consent Decree fails to deal effectively with clearance problems or to give adequate relief, and refers to certain aspects in which Section VIII does not afford adequate relief. If called to testify I would deal with these matters as follows:

"AS TO THE GOVERNMENT'S REQUEST FOR A MODIFICATION OF SECTION VIII SO AS TO PROHIBIT CLEARANCE BETWEEN THEATRES NOT IN 'SUBSTANTIAL' COMPETITION.

"Clearance is a by-product of competition. Competition makes clearance necessary. They are therefore closely related.

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(2602) "When a salesman or a Branch Manager negotiates a license agreement he does so with a gen-

eral knowledge of the competitive situation that exists between theatres requesting clearance and the theatres over which clearance is requested. While they have a general knowledge of the extent of that competition, it is difficult for them to measure the extent thereof by any fixed standards. Competition may undoubtedly exist, and yet it is difficult to agree upon it as being intense or substantial or slight or negligible or in any other precise manner. The competition that exists varies to some degree. One theatre may be said to be more competitive to another than is a third theatre. One theatre may draw more patronage from the neighborhood of one theatre than from the neighborhood of another. Frequently the competition between two theatres in the same competitive area is one way, that is, Theatre A will draw some patronage from a wide area including the area in which Theatre B is located, and yet Theatre B will not draw patronage from the area in which Theatre A is located.

(2603) "Yet there can be no doubt that Theatre A and Theatre B are in direct competition. In such a case it is difficult to say to what precise degree they are competitive. How many people would one theatre have to draw from the neighborhood in which another theatre is located to make for substantial competition? How many patrons would theatres have to draw from one another to make the competition slight or negligible? This is of course difficult to say. Frequently it rests on judgment and opinion.

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"Exhibitor A seeking the clearance honestly believes the competition is substantial. Exhibitor B believes it is either slight or negligible. There is honest room for difference between them. They are both actuated by self-interest and their conclusions may be somewhat influenced, consciously or unconsciously by their self-interest.

"The salesman's or Branch Manager's interest is somewhat different. He wants to give Exhibitor A the clearance that he believes it rightfully deserves and requires to enable it to pay the desired license fees. He is opposed to granting clearance which is too long because that would affect the revenue of the distributor from Exhibitor B and other subsequent run exhibitors.

"In the light of these considerations and the factors involved in determining the appropriate clearance to be granted, such as size, location of theatres, competition, admission prices, film rentals paid, policy of operation, and others, clearance is reached by agreement which fixes the period of clearance and the area. Such agreement represents the considered judgment of the parties deal-

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ing with the subject. It is based largely on opinion and in this realm, honest men may differ.

"When any exhibitor feels aggrieved by the clearance granted, the opportunity is afforded to him of arbitrating the question before an impartial arbitrator and having his determination reviewed by an Appeal Board. In an arbitration proceeding the Arbitrator in the first instance and the Appeal Board on review, weigh all of the factors including the most important one, namely, competition and the elements which must be taken into considera-

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tion to determine the extent thereof. Upon a consideration of all of the facts, a determination is made as to whether the clearance which was granted was either too long in point of time or too extensive in area.

"In my judgment, that is the ideal way in which the matter should be dealt with. It is not proper to remove clearance entirely where competition is found to exist, although it may not be 'substantial.' Where the competition is not substantial, the clearance should be less than what it would have been were the competition substantial, but where there is some competition there ought to be some clearance.

"The provisions of the Consent Decree are eminently fair and there is no basis for the modifica-

(2605) tion sought by the Government, to eliminate clearance between theatres which are not in substantial competition.

"AS TO THE GOVERNMENT'S REQUEST THAT THERE SHOULD BE A PROHIBITION AGAINST THE GRANTING OF CLEARANCE BETWEEN TWO THEATRES CHARGING 'SUBSTANTIALLY' THE SAME ADMISSION PRICE.

"From the Government's viewpoint the admission price seems to be the only factor which it claims should be taken into consideration in determining clearance; but this is wholly arbitrary and unrealistic.

"Section VIII of the Consent Decree enumerates the factors to be taken into consideration in determining clearance. They are the proper factors. Price is only one of them. If that were to be

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the only factor, it would be very detrimental to the exhibitor, to the distributor and to the public, besides which, it would be patently unfair.

"Let us take as one example, a 2000 seat theatre in a certain community. It is well located, modern, with fine appointments. It is a large theatre and to fill its 2000 seats, pay its overhead, pay the large license fees that it does for its pictures, and make a profit, it must draw a large patronage. It is located in a section of the city which has inhabitants of different economic levels. To fill its

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theatre it must draw from all of the different income levels. The exhibitor decides to charge 35 cents admission. He can operate successfully because, at that price, he can attract a large number of people and pay, let us say, \$1,000. for the showing of a picture on a run ahead of his competitor.

"His competitor has a theatre of 500 seats. It is a nicely built theatre. It does not have the large overhead of the other theatre. It does not do as much advertising, and it does not need as much patronage. It caters to the inhabitants of the neighborhood in the higher income level, and the exhibitor who operates it also wishes to charge 35 cents. He pays, and only can afford to pay, \$100. for the license to exhibit the same picture for which the competitor pays \$1,000. The showing of the picture simultaneously will divert some of the patronage from the larger theatre to the smaller theatre.

"Is it fair to the exhibitor who pays \$1,000. for a picture, to have a theatre nearby paying \$100. show it at the same time? Some of the value of the picture for which the exhibitor of the larger theatre has paid so much is taken away by the smaller

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theatre showing it at the same time and at the same price. The exhibitor paying the larger sum would not be able to continue to pay this sum if the smaller theatre plays the same picture at the same

time. Therefore the distributor's revenue from the larger theatre would be jeopardized through the division of the patronage by the playing of the same picture at the same time by the larger and the smaller theatre.

"From the standpoint of the public, it would be benefited by a successive showing in these two theatres. Some people would not find it convenient to see the picture while it was showing simultaneously at both theatres. They might have the opportunity to see it at the first theatre, but if not, they might be able to see it later on at the smaller theatre. This is of advantage to the public.

"Moreover, the exhibitor of the smaller theatre is not obliged to charge the 35 cents which is the same admission price that the larger theatre is charging. He might charge 25 cents for a later showing but he chooses not to do so for he believes that he can draw the same amount of patronage at the higher admission price and make more money.

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"Let us consider further what the effect would generally be if the Government's suggestion were put into effect, namely, that all theatres charging substantially the same admission price should all enjoy the same run, that is, play at the same time,

or that they should have the opportunity to play the picture at the same time, that is, that they have equal availability for booking the picture with other theatres charging the same admission price.

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"For example, Theatre A charges 35 cents and plays seven days ahead of Theatre B, the latter charging 25 cents. Under the Government's proposal, Theatre B should be able to play day and date with Theatre A, or at least have an equal availability to play the picture if it charged the same admission price as Theatre A. The effect of this would be that Theatre B could, by raising its admission price to 35 cents, play the same pictures at the same time as Theatre A. The public, which had previously had the choice of seeing a picture at Theatre A at 35 cents or at Theatre B seven days later at 25 cents if they preferred, would now have to pay 35 cents to see it at either theatre playing it at the same time, or not at all.

"It is difficult to understand how the Government which is seeking to protect the public interest, can seriously urge that the same price should entitle all exhibitors in a community to the same playing position. If this suggestion of the Government were to be adapted the tendency would be to increase admission prices. Moreover, as the number of theatres playing simultaneously in-

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creased, more positive prints would be required and the increased cost of distribution through the increase in the positive prints would be staggering.

"The Government suggests also that theatres charging the same admission price should have open booking with each other or equal availability for exhibiting the same picture, so that the pictures released by a particular distributor may alternately be made available first to one theatre

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and then to the other. In this way they would not have to be shown simultaneously at both theatres.

"This suggestion would be very disadvantageous to the exhibitors involved, to the distributors and to the public. This would work out as follows:

"Theatre A would play Picture One ahead of Theatre B and Theatre B would show it after Theatre A. Theatre B showing it later perhaps could not afford to charge the same admission price and would therefore probably charge less than Theatre A. On Picture Two, Theatre B would play ahead of Theatre A, and the price would be higher for that picture than for Picture One. Theatre A in this instance would play this picture after Theatre B. Theatre A's prices, under these circumstances, would have to be lower than the prices of Theatre B. There would therefore be an up and down change of prices with each succeeding picture. This would not be a sound busi-

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ness policy for either exhibitor A or B.

"In the illustration given, Theatre A would not want to follow Theatre B and Theatre B would not want to follow Theatre A, as is oftentimes the case in competitive situations. They each wish to play 'clear' pictures, i.e., pictures which have not been shown in the directly competitive theatres. If the same admission prices entitled each of them to equal availability, they would prefer to buy pictures clear of each other instead of following the other theatre. The result of this would be that in place of two runs which the distributor might have theretofore licensed, the new practice would result in a single run of a picture between these

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two competitive theatres, with the resulting loss in revenue to the distributor and the loss of a second opportunity for the public to see the picture.

"From what I have already heretofore stated, it is clear that this arrangement would be detrimental to the public interest because of its tendency to increase admission prices and reduce the facilities for seeing a picture at more than one theatre in a neighborhood on successive runs.

(2611)

"AS TO THE GOVERNMENT'S CONTENTION THAT CLEARANCE SHOULD BE ADJUSTED ACCORDING TO PRICE DIFFERENTIALS IF THERE IS TO BE ANY PUBLIC JUSTIFICATION FOR CLEARANCE.

"The Government's contention, again, in this respect, is unrealistic and demonstrates a lack of appreciation of the problems involved in clearance.

"As has been pointed out above, price is not and should not be the sole criterion for determining whether there should be any clearance, and if so, the approximate period. Price is only one of the factors which should be taken into consideration. The provisions of Section VIII of the Consent Decree set out the proper factors and give the arbitrator and Appeal Board the right to determine the importance and the weight to which each of these factors is entitled. This is the fairest way that this problem can be dealt with, and clearance cannot and should not be determined by the sole factor of admission prices or admission price differentials.

"Moreover, no two localities are the same, and the factors determining the proper clearance have

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different weight and different significance in each situation. Admission prices affect different theatres differently. One theatre is directly affected by what another theatre in the same locality charges, while another is not.

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"AS TO THE GOVERNMENT'S CONTENTION THAT RELIEF SHOULD BE GRANTED, EXPRESSLY DIRECTED AGAINST UNREASONABLE CLEARANCE ARISING FROM THE AFFILIATION OF THEATRES WITH A DISTRIBUTOR.

"The Government assumes that there is some system of 'cross-licensing' of pictures for exhibition at the theatres of each of the defendants. There is no basis for this assumption.

"The function of the Distribution Department of Paramount is to distribute the pictures which it releases. That is also my function. Our department has no concern with the matter of what pictures other than Paramount pictures will be shown at the theatres in which Paramount has a financial interest. In licensing Paramount pictures for exhibition in theatres in which other defendants are interested, I am not concerned whether or not that defendant as a distributor licenses its pictures to the theatres in which our company is interested or the terms on which they are licensed for exhibition therein. That is a matter entirely beyond the functions of the Distribution Department.

"I could therefore state unequivocally that there is no 'cross-licensing' of Paramount pictures with anyone. In dealing with the subject of clear-

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ance, affiliation plays no part.

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"I consider the question of whether the clearance is reasonable or not, wholly independent of whether the theatre is or is not affiliated with any distributor. This is also true of the deals which I negotiate myself, as well as those which have been negotiated by other members of the Distribution Department and are submitted to me for rejection or approval.

"The Consent Decree has adequately safeguarded the matter of granting of unreasonable clearance to affiliated theatres. The arbitrators as well as the Appeal Board have ample power to reduce clearance when in their judgment such clearance as has been granted to affiliated theatres is too long in time or too extensive in area.

"In an arbitration proceeding under Section VIII its provisions enjoin the arbitrator to disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres. In other words, an arbitrator must, in determining the reasonableness of clearance, wholly disregard the fact of affiliation and he must determine the reasonableness or unreasonableness of the clearance granted as between the two theatres, based upon the inherent merits of the situation concerning those particular theatres without regard to the fact of whether or not they are affiliated with a distributor.

(2614)

"AS TO THE CLAIM THAT THERE SHOULD BE SOME PROVISION TO PREVENT UNREASONABLE CLEARANCE, RESULTING FROM CIRCUIT BUYING POWER OF INDEPENDENT CIRCUIT.

"I need only state here what I have said under the preceding subject in dealing with affiliated

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theatres. The arbitrators, as well as the Appeal Board, have ample power under the Consent Decree, to deal and have dealt effectively with this matter and have reduced clearance wherever their judgment was at variance with the judgment of the men in the industry who negotiated such clearance.

"AS TO THE CRITICISM OF THE GOVERNMENT THAT A COMPLAINING EXHIBITOR IS SOMETIMES NOT AWARE OF CERTAIN CLEARANCES TO WHICH HIS THEATRE IS SUBJECT.

"The Government seizes upon the observation made by the Appeal Board in one case before it, that an exhibitor sometimes does not know of some of the clearances granted by the distributors against his theatre, since they are not contained in his contract but only in the contracts of the other exhibitors who are granted clearance over his theatre. The Appeal Board's comment was

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that this situation seemed unfair to them.

"Unfortunately, all of the facts as to the manner in which clearances are dealt with in contracts were not fully explained by pertinent testimony on the subject. If they had been, I am confident, there would have been no basis for criticism.

"The cases are rare indeed when an exhibitor does not know the clearances to which his theatre is subject. If he does not know, he soon learns this when he books his pictures at the various exchanges, and he learns from the various bookers the pertinent information. He also learns from observation, the manner in which and the time when his competitors book their pictures in rela-

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tion to the dates which he gives for the exhibition of his pictures at his theatre. If he did not know in the first instance the clearances to which his theatre is subject, he has the opportunity the very next time he negotiates for pictures to deal with such clearances as he has observed exist and have been granted against his theatre. Often it would be very impracticable and difficult to insert the names of all theatres which are granted clearance over complainant's theatre, or to state the playing position of the complainant's theatre as being after specifically named theatres which have been granted clearance. Sometimes it is left out

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through oversight.

"The whole subject is magnified out of all proportion to the reality of the situation...

"AS TO THE GOVERNMENT'S CRITICISM THAT CLEARANCE CANNOT BE THE SUBJECT OF ARBITRATION UNLESS A CONTRACT IS IN EXISTENCE.

"The Government suggests that Section VIII is defective in that an exhibitor cannot arbitrate the question of the reasonableness of clearance to which his theatre is made subject, unless he is currently licensing pictures from the distributor granting the clearance over his theatre. As I have already pointed out, Section VIII sets out the factors which are to be considered in determining whether the clearance which has been granted is reasonable or unreasonable. This presupposes that a contract has been entered into. In the absence of a contract, the question of the reasonableness or unreasonableness of clearance cannot be determined because of the absence of the con-

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tract terms, such as run, license fees, exhibition period and other terms. It is difficult to conceive how an arbitrator can deal with this subject unless he knows the terms which are important factors bearing on the reasonableness of clearance.

"An arbitration, in the absence of a contract might be wholly a waste of time because an exhibitor who obtained an award which fixed the

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maximum clearance that might be granted against his theatre might in spite of the award not enter into a contract with the particular distributor against whom he has brought an arbitration proceeding.

"As a practical matter, if the exhibitor is desirous of having maximum clearance determined by arbitration, he can proceed against any distributor with whom he has contracted. If an award is made, establishing what the maximum clearance should be, although it would not be binding upon the distributor who held no contract with the complaining exhibitor, nevertheless that distributor would have to deal with the complainant upon the basis of the maximum clearance fixed in the award. To do otherwise and to impose a longer clearance would subject such distributor to a competitive disadvantage in dealing with the complaining exhibitor and other exhibitors who might be affected. If an arbitration award fixed fourteen days as the maximum clearance, and most distributors were dealing on that basis, any distributor who tried to deal on the basis of a greater clearance would be at a disadvantage because the exhibitors would refuse to deal except on the basis of the maximum 14-day clearance fixed in the award. If the distributor did not do so, and en-

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tered into a license imposing greater clearance, it is quite probable that it would be obliged to conform to the prior award by any arbitrator appealed to, since the finding as to what was reasonable in the case of other distributors would undoubtedly be adhered to unless special circumstances justifying the longer clearance were shown. The criticism is therefore without merit.

(Sgd.) JAMES J. DONOHUE."

Mr. Seymour: In addition I have a group of affidavits, some 19 or 20 in number from various other operating heads of the theatre operating companies in which Paramount has an interest. Rather than encumber the stenographic transcript with all of those affidavits, I would like to offer them in evidence as a group, with the same force and effect as if they were in the stenographic transcript.

Government counsel has kindly agreed to stipulate that if called each of those gentlemen would testify in accordance with his affidavit with the same force and effect as if called. So I would like to have these affidavits marked as a group as an exhibit and have only one of them copied into the record so that the general tenor of these affidavits—they are substantially similar—will be in the stenographic transcript.

(2618a)

Judge Bright: What is the tenor of it?

Mr. Seymour: Perhaps I might read one.

Judge Bright: I do not care about that. A brief statement will do.

Mr. Seymour: Well, they are brief. Let me read one and that will be the one in the record, and the rest will go in as exhibits, if I may.

Harry David

(2619)

Mr. Seymour: This is an affidavit of Harry David.

"HARRY DAVID being duly sworn, deposes and says: If I were called as a witness to testify in this action and were asked the following questions I would make the following answers, with the same force and effect as if actually called as a witness.

"Q. Where do you reside? A. Cincinnati, Ohio.

"Q. How long have you been engaged in the motion picture exhibition business? A. Forty (40) years.

"Q. What is your present position? A. I am the general manager of Northio Theatres Corporation, which is interested in the operation of approximately sixteen (16) theatres in the States of Ohio and Kentucky.

"Q. What is the extent of Paramount's interest in the company to which you refer? A. Paramount owns 100 per cent of the stock.

"Q. Is a part of your compensation based upon the profits from the operation of the theatres which you have mentioned? A. Yes.

"Q. Where are the negotiations for licenses for films of distributors other than Paramount conducted on behalf of the theatres which you operate? A. Generally at the office of our company at Cincinnati, Ohio.

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"Q. Do you conduct or supervise the conduct of those negotiations for your company? A. Yes.

Harry David

"Q. At the time you negotiate with representatives of Loew, Fox, Warner or RKO, do you have any knowledge or information as to negotiations or film deals for the exhibition of Paramount pictures in theatres in which any of those distributors have an interest? A. No.

"Q. At the time you negotiate with representatives of distributors which do not have any interest in theatres do you have any knowledge or information as to arrangements which they have made with theatres in which defendants are interested? A. No.

"Q. Is there any relationship whatever between the terms of film deals negotiated for the theatres which you operate and any negotiations or arrangements for the licensing or exhibition of Paramount films in theatres of any other defendant? A. No.

"Q. Is there any relationship whatever between film deals of your company and film deals of any other company in which Paramount is interested? A. No.

"Q. Does any representative of Paramount participate or interfere in any way in your negotiations with distributors for the licensing of films to be used in theatres operated by your company or dictate or advise you as to the terms of any film license contracts that you make or are to make with any other distributor? A. No.

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"Q. Do you license the pictures of Loew, Fox, Warner and RKO for exhibition in all your theatres? A. Generally speaking yes, but there are exceptions.

Harry David

"Q. Do you license the pictures of Columbia, Universal and United Artists for exhibition in all your theatres? A. Yes, generally speaking, with exceptions."

I might say those answers vary from operating company to operating company.

(Continuing reading):

"Q. Are there theatres which you operate in which you would like to license the pictures of the foregoing distributors where you are unable to do so? A. Yes.

"Q. In the cases referred to in the last question do the distributors mentioned license some or all of their pictures to theatres which are in competition with the theatres which you operate? A. Yes.

"Q. Do you license films distributed by Republic, Monogram and P.R.C. in some or all of your theatres? A. Yes, except for Republic."

And that answer varies with various companies.

(Continuing reading):

"Q. Where you operate a theatre on a first-run policy, is it the best or comparable with the best theatre in that locality? A. Yes.

(2622) "Q. Does your company follow a policy of

keeping all theatres which you operate up to date in accordance with the needs of the community? A. Yes.

"Q. Who determines the admission price to be inserted in film license contracts with distributors

Colloquy

which contain a provision for minimum admission price, except in those instances where the pictures are special attractions like 'Gone With The Wind', which play at an advanced admission price? A. I do.

(Sgd) HARRY DAVID."

That is the general form of all those affidavits. There are some variations in the answers, but I have indicated where those variations appeared.

Of course, the extent of Paramount's interest varies in these different companies, as we have already brought out.

I would like to have this group of affidavits now marked as an exhibit, leaving that as a sample of the exhibit in the transcript.

(Marked Defendant Paramount's Exhibit P-24.)

Mr. Seymour: I am sorry to say I haven't an accurate count. There are around 19 or 20. There are one or two, or perhaps more, affidavits of the same kind which have not yet arrived in New York, and I would like to add those to this group as a part of this exhibit when they arrive, if Government counsel is agreeable.

(2623)

I have another group of affidavits, which I am not going to bother to read, which I would like to offer as one exhibit on the basis that, if called, the affiants would testify in accordance with their affidavits with the same force and effect as if actually called, a stipulation to which Mr. Wright kindly has agreed. These are affidavits dealing with the physical conditions of the theatres in which Paramount is interested in

Sam Dembow, Jr.

various cities, having populations of between 25 and 100 thousand, of the United States, and which also describe the physical characteristics of the best independently operated theatre in those localities. There are 97 of these affidavits, and I would like the same privilege. There may be a couple more coming in, and I would like to add those to that exhibit when they come.

(Marked Defendant Paramount's Exhibit P45.)

(2624)

Mr. Seymour: I have one more affidavit on a different subject, and Mr. Wright has stipulated that if called, this gentleman, Mr. Sam Dembow, Jr., would testify in accordance with this affidavit with the same force and effect as if actually called to the stand, and I think I would like to read this into the record, if I may:

"Q. Where do you reside? A. No. 1 Prior Manor Road, Larchmont, New York.

"Q. What is your present occupation? A. Presently I am the President of Golden Pictures, Inc.

"Q. Is that a motion picture producing company? A. Yes.

"Q. Have any of the defendants in this action a stock interest in that company? A. No.

"Q. How long have you been president of Golden Pictures, Inc.? A. I think it is about six or eight months.

"Q. Prior to that time were you employed by Paramount Pictures, Inc.? A. Yes, I left Paramount in November, 1944.

"Q. How long have you been in the motion picture business? A. Since 1913.

Sam Dembow, Jr.

"Q. Will you kindly tell us of your start in the business? A. In 1913 I began to work for William Fox as a salesman. He was at that time distributing foreign subjects. Later he went into the production end of the business and subsequently the

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company was changed to Fox Films. I occupied an executive position with that Company and opened up probably 75 per cent of the exchanges which they had throughout the United States. When I left Fox in 1921 or 1922, I was Assistant General Sales Manager. I resigned to become the Pacific Coast District Manager for Goldwyn Pictures. I stayed with that company for a very short time."

Mr. Wright: I think it should appear that that is Goldwyn Pictures there, and on the other occasion that he is now employed by the Golden Pictures. I don't know whether that was clear to the Court. Those are different companies.

Mr. Seymour: I tried to make the inflection different but probably did not. They are different.

(Continuing reading) "Rothchild, who operated the theatres in San Francisco, was my first run customer and had taken a fancy to me, and I went over to him as General Manager of his theatres.

"Q. When did you first become associated with Paramount? A. I joined the theatre department of Paramount in 1925.

"Q. How long did you remain with the Paramount theatre department? A. From 1925 to 1935.

"Q. During that period what office did you hold? A. I was Executive Vice-President of Publix

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Theatres Corporation until 1932, when that corpo-

Sam Dembow, Jr.

ration ceased to do business and I continued in the employ of Parameunt Publix Corporation during the the period of its reorganization in the bankruptcy proceeding.

"Q. When you left Paramount in 1935, where did you go? A. I resigned from Paramount to become General Manager of National Screen Service, Inc.

"Q. How long were you with that company? A. About two and one-half to three years.

"Q. When you left National Screen Service, Inc., where did you go? A. I became Vice-President of Fanchon & Marco, Inc., in which company I had a financial interest. I resigned from Fanchon & Marco and sold my interest therein in 1939 and returned to Paramount in January, 1940.

"Q. When you returned to Paramount in 1940, what position did you occupy? A. I was one of the executives in the theatre department, of which Leonard H. Goldenson was the head.

"Q. Did you occupy that position until you left Paramount in November, 1944? A. Yes.

"Q. During the depression period, did the theatre operating companies in which Paramount had an interest occasionally make operating agreements, sometimes called 'Pooling Agreements', affecting one or several theatres in which Paramount had an interest and one or several theatres in which

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exhibitor had an interest? A. Occasionally such agreements were made.

"Q. Were such agreements occasionally made affecting a theatre or theatres in which Paramount had an interest and theatres in which an independent exhibitor had an interest? A. Yes.

"Q. Were such agreements occasionally made affecting a theatre or theatres in which Paramount

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was interested and one or several theatres in which another defendant in this case was interested? A. Yes.

"Q. What was the reason for making such agreements? A. In the depression period theatres were having great difficulty making both ends meet and in handling the product available to them in such a way as to make the operation profitable. Theatre A would have available motion picture product of varying suitability. Some product was suitable for the patronage of theatre A. Other product was not suitable.

"Theatre B in the same city or town had the same problem. It was having difficulty making ends meet and the same difficulty with respect to the available product. If theatre A and theatre B were operated under joint management there would be more flexibility in the booking of the pictures which were theretofore available to theatres A and B. Some pictures would be more attractive to the

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patrons of theatre A while other pictures would be more attractive and suitable to the patrons of theatre B. Under joint management, the pictures most suitable for exhibition in theatre A would be booked in theatre A, whereas the pictures most suitable for theatre B would be booked there. The patrons of theatre A would like musicals and society dramas, whereas the patrons of theatre B might be better served and pleased with mystery pictures, action pictures and the like.

"In addition to this, economies could be effected in the joint operation in advertising, personnel and the elimination of efforts which were duplicated, and more efficient management could be accomplished.

Sam Dembois, Jr.

"Operating agreements were therefore entered into in a few localities to stop the huge losses brought about by the depression and make for more economical and profitable operation of both theatres.

"Q. Were admission prices advanced following the making of such operating agreements? A. To the best of my knowledge, no. The purpose of making those agreements was not to raise admission prices.

"Q. Were the total number of pictures played, reduced, following the making of such agreements? A. To the best of my knowledge, no.

"Q. How many of such operating agreements affecting theatres in which a defendant has an in-

(2629)

terest are now in effect? A. I believe there are eight.

"Q. Which are they? A. There are such operating agreements"—I interpolate here, "affecting the theatres in which Paramount has an interest, for clarity—"with regard to certain theatres in Rochester, N. Y., Minneapolis, St. Paul, San Francisco, Hammond, Indiana, Philadelphia, and Brooklyn. In Yonkers, N. Y., a 50 per cent Paramount affiliate subleases its theatre to RKO Proctor Corporation at a rental based upon the net operating revenue of that theatre and a theatre which RKO Proctor Corporation owns in Yonkers. RKO Proctor Corporation operates both theatres.

"Q. Did the reasons which you have given for making operating agreements generally apply to these agreements? A. Yes.

"Q. Were the operating agreements to which you have referred which were made during the

Sam Dembow, Jr.

depression, entered into in pursuance of a general policy of making such agreements? A. No. They were made on the basis of peculiar local conditions affecting the theatre business and the impact of the depression upon it in a few particular localities.

(2630)

"Q. How did Paramount acquire an interest in Canal Realty & Improvement Co., which has a ground lease on the Loew's State Theatre in New Orleans and what is the nature of that interest?"

Mr. Seymour: I think rather than burdening the Court with this, I will have this copied into the record. This deals with a few theatre investments and other things of that kind which are mentioned in the Government's brief, and this affidavit explains them. So, from here on, I will let the stenographer copy it rather than take the Court's time to read it, if I may.

(The balance of the affidavit reads as follows:)

"A. Many years ago Paramount acquired an interest in Saenger Amusement Co., which had theatre interests in New Orleans and other places. One of the Saenger assets was a one-third stock interest in Canal Realty & Improvement Co. Klaw and Erlanger had a one-third interest in that company and Loew's had the remaining third. Later Loew's acquired Klaw & Erlanger's stock. For many years Paramount-Richards Theatres, Inc., in which Paramount has a 50% stock interest, has held this one-third of the stock as an investment, which gives Paramount a 16 $\frac{2}{3}$ per cent indirect stock interest. Loew's has had the management contract and has operated the theatre. Paramount

Sam Dembato, Jr.

has nothing to do with the operation of the theatre either directly or indirectly.

"Q. Does Loew license Paramount feature pictures for exhibition in Loew's State Theatre? A. To the best of my knowledge it does not.

(2631)

"Q. Have Paramount and Loew's stock interests in Buffalo Theatres, Inc., which operates certain theatres in the Buffalo area? A. Yes.

"Q. How were those interests acquired? A. Prior to 1934 Paramount and Mike Shea were the only stockholders in certain corporations which leased and operated certain theatres in Buffalo. Loew's was the landlord of one of those theatres—the Great Lakes. Those corporations were in default in rent when Paramount-Publix went into receivership. Paramount-Publix had guaranteed the rent of the Great Lakes, and as a consequence, Loew's had a substantial claim against Paramount. There being no money available to satisfy this claim and the claims of the other landlords for rent, Buffalo Theatres Inc. was formed to take over the operation of the theatres and the landlords, creditors and former stockholders of the lessee companies received stock in the new company.

"Q. Does Paramount operate these theatres? A. To the best of my knowledge Paramount has had nothing to do with the operation of the theatres since 1934.

"Q. What interest, if any, has Paramount in 423 South Broadway Corporation, which owns the Parkhill Theatre in Yonkers? A. Straham Theatre Corporation, in which Paramount has a 50 per cent stock interest owns 20 per cent of the stock of

Colloquy

(2632)

that corporation. RKO Proctor Corporation owns 30 per cent of the stock and Max Cohen 50 per cent.

"Q. Does Paramount operate this theatre? A. No. I am informed that the Parkhill is actually operated by a corporation in which Paramount has no interest.

"Q. What interest has Paramount in Standard Theatre Corporation which operates certain theatres in Oklahoma City? A. Paramount has a one-half interest in Criterion Theatre Corporation and the other half of the stock is owned by Joe Cooper. Criterion has a one-half interest in Standard Theatre Corporation, the other half being owned by Warner Bros.

"Q. Who actually operates the theatres? A. To the best of my knowledge, Joe Cooper has a contract with Standard whereunder he manages, buys and books. Paramount does not participate in any way in the actual operation of the theatres.

(Signed) SAM DEMBOW, JR."

Mr. Seymour: I would like to ask Mr. Wright to stipulate, subject to correction, that Paramount has an interest in theatres in 516 incorporated places in the United States out of a total of 16,752 incorporated places in the United States, according to the 1940 Census.

(2633)

Mr. Wright: Yes. I thought we were going to have this one master list, showing where everybody had theatres, and that that would take care of that. That was the list that RKO offered. I thought Mr. Phillips took it and checked it.

Colloquy

Mr. Seymour: We are in the process of checking it, but there is no dispute about those facts, is there?

Mr. Wright: Not as far as I know. There certainly cannot be any ultimately.

Mr. Seymour: All right. Now I offer, subject to correction, a list of 1,149 cities or towns in the United States with a population of over 5,000, according to the 1940 census, in which all the theatres are independently owned and operated.

Mr. Wright: No objection.

(Marked Defendant Paramount's Exhibit P-26.)

Judge Goddard: This is not 26. The affidavit was 26. Didn't you intend to mark that exhibit of Sam Dembow?

Mr. Seymour: I read that into the record, Judge Goddard, rather than having it marked as an exhibit.

(2634)

Mr. Seymour: In addition to the affidavits in the two groups which I have asked permission to supply, I have one affidavit on the way which deals with the Butterfield Theatres, and I am sure Mr. Wright will be willing to stipulate it when he sees it; and I should like leave to supply that as a stipulation with Mr. Wright when it is available.

May it be assumed that the silence of the Court permits me to supply that additional affidavit at a later date?

Judge Bright: We were discussing discrimination based on mere size against Elizabethtown, New York.

Mr. Seymour: I am sorry. Judge Hand knows so much more about it than we, that I am not pre-

Colloquy

pared to put in any direct testimony on that at this time.

I think with those additional affidavits that I have mentioned, that we will not have anything further at this time.

Mr. Proskauer: Your Honors, I think I have my stipulation with Mr. Wright now arranged in the way in which he is willing to take it:

It is stipulated that Roy Haines and Jules Lapidus, if called as witnesses on behalf of the defendant Warner Brothers Pictures, Inc., each would testify as follows, with the same force and effect as if they were

(2635)

called and subjected themselves to cross-examination:

Mr. Roy Haines would testify that he has been with Warner Brothers or its predecessors since 1919; that from 1919 to 1927 he was branch manager at Cincinnati; from 1927 to 1931 he was branch manager at Pittsburgh; from 1931 to 1933 he was central district manager; from 1933 to 1936 he was metropolitan New York district manager; from 1936 to 1937 he was eastern district manager; from 1937 he was eastern sales manager, including Canada; and from 1943 to date he has been the western and southern sales manager.

As to Jules Lapidus, he entered the motion picture business in 1921 as a Universal salesman in Pittsburgh; from 1922 to 1925 he was not in the motion picture business; from 1925 to 1926 he was salesman for Metro Pictures in Pittsburgh; in 1926 and 1927 he operated a theatre personally; from 1927 to 1937 he worked for Loew's as Metro salesman in Pittsburgh; from 1937 to 1939 he was a branch manager with the Grand National Company; from 1939 to 1940 he was a Universal branch manager in Pittsburgh;

Colloquy

from 1940 to 1942 he was Universal district manager; from September, 1942, he was a Warner metropolitan district manager in New York, and since February, 1943, he has been the Warner eastern sales manager.

(2636) "In my present position," Mr. Lapidus says,

"I have supervision over eleven exchanges in the United States."

Mr. Haines says, "In my present position I have supervision over twenty-one exchanges in the United States."

Mr. Lapidus continues: "Thus, between Mr. Roy Haines and myself we have supervision over all Warner exchanges in the United States."

Each of them testifies as follows:

"In the respective exchange areas over which I have supervision, there is not now, and to the best of my knowledge, information and belief there has not been any contract, agreement, understanding or concert of action between Warner and any one or more of the defendants with respect to any of the following matters:

"The restraining of competition among or between the defendants, or any of them, in either the distribution or the exhibition of motion pictures.

"The terms upon which or the time when feature films were or were to be licensed by any distributor defendant to any exhibitor.

"The discriminating in favor of so-called 'affiliated' or so-called 'circuit' theatres and against so-called 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called 'affiliation.'

Colloquy

(2637)

"The exclusion of so-called 'independent' exhibitors from operating first-run theatres in competition with so-called 'affiliated' theatres.

"The exclusion of so-called 'independent' exhibitors from operating subsequent-run theatres on the same run as and in competition with so-called 'affiliated' theatres.

"The use of first and other early run so-called 'affiliated' theatres to control the film supply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres.

"The division of available films among theatres owned or controlled by two or more producer-exhibitor defendants.

"The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers.

"The form of license agreement used or to be used after 1930, in licensing the exhibition of films or any provision included or to be included therein.

"The film rental, whether flat or percentage, charged or to be charged by Warner to any theatre or theatres.

"The run granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a

(2638)

so-called 'independent' theatre.

"The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner, or form in which the clearances in any city or area shall be set up or stated.

"The minimum admission prices inserted or to be inserted in licenses for any theatre, whether a so-called 'affiliated' theatre or not."

Colloquy

It is also stipulated that each of said witnesses would testify that in the respective exchange areas over which he has supervision:

A. Warner has not prevented any defendant or any so-called "independent" distributor from competing with Warner's in the distribution of films.

B. Warner has never discriminated in favor of so-called "affiliated" or so-called "circuit" theatres and against "independent" theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called affiliation.

C. Warner never has conditioned its granting a license for the exhibition of film distributed by Warner in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting Warner a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by

(2639)

Warner, or in any way taken into consideration in licensing films to exhibitors any action of other producers in licensing its films to Warner theatres or to anybody else.

D. Warner has no agreement or understanding with any prior run exhibitor, either a so-called affiliate or independent, fixing the minimum admission price which Warner must insert in its license agreement with a subsequent run exhibitor.

Mr. Pride: Are you all through?

Mr. Proskauer: All through.

Colloquy

Mr. Pride: We would like to offer on behalf of National Theatres Corporation testimony of five of the principal executive officers of its operating companies. I have four of these here. A fifth is in transit by air mail from California, and I shall ask leave to put that in later.

This is stipulated testimony of Mr. Harold J. Fitzgerald, Frank L. Newman, Sr., Elmer C. Rhoden and Frank H. Ricketson, Jr. I would like to have those transcribed into the record; but I might say that Mr. Wright and I have the understanding, since he has not had full opportunity to go over all the statements, that he will advise us as to any supplements, changes or issues which he thinks are raised by them which should be either changed or supplemented; and I therefore suggest that the reporter withhold transcribing

(2640)

them into the record until any questions concerning their contents are straightened out.

I should also like to offer as Fox Exhibit F-22 a list of franchises of Twentieth Century-Fox for the 1938-39 season which was the year in which it had its largest number of franchises. I have given Mr. Wright a copy.

(Marked Defendant Twentieth Century-Fox Exhibit F-22.)

Mr. Pride: We may have, your Honors, one or two other exhibits here which I would like to confer with Mr. Caskey about on his return, and I am certain we can straighten out their introduction then.

Judge Hand: All right.

Judge Bright: That completes your case?

Mr. Pride: Subject to that last reservation, sir, yes.

Colloquy

Judge Hand: Well, do I understand the defendants rest with the exception of applying some of these supplemental things that you have indicated?

Mr. Seymour: Aside from those which I reserved, there is only one other problem, and it certainly does not prevent our resting. Because of the haste of the trial we—at least—and I suppose other counsel—have not had a chance to examine this record with care for possible corrections. In the event that there should

(2641)

be any interim at this time in the trial, we would like to examine it and attempt to agree with Government counsel on those corrections and make them physically in the printed copies of the records, which we now have available; and then we would like to furnish the Court with printed copies of the record with those changes physically made so that it will save your eyes in the reading of the stenographic transcript, and you won't have to look around for corrections. We shall also supply printed copies to the Government. If there should be a difference on any correction which we regard as substantial I should like to have the privilege of dealing with that. I hope we shall be able to stipulate all the corrections. Subject to that, as far as we are concerned, we rest.

Mr. Proskauer: I think we are all ready to rest, your Honors, with the understanding that if anything comes up hereafter which we think we omitted, it is not going to be of a fundamental character, and we may have the privilege of supplying to your Honors any little additions or inadvertences.

Mr. Davis: We rest with the proviso, as I stated this morning, that there are one or two exhibits I want to consider.

Colloquy

Judge Hand: Now, do you expect to print this
(2642)

record, all of you, get up a joint record?

Mr. Seymour: There is a print of the record which has been made contemporaneously, and it is that that we shall correct.

Judge Hand: That is what you wanted to fix up?

Mr. Seymour: Yes, and furnish the Court with copies as soon as those corrections have been made.

Judge Hand: I see; and that covers all the testimony of everybody?

Mr. Seymour: Yes, from the very beginning. It does not cover the exhibits, but it covers all the testimony.

Judge Hand: And the exhibits you are going to submit just as they are submitted?

Mr. Seymour: Yes, unless some more convenient method occurs to your Honors. There are so many exhibits that the printing of them at this stage would be very burdensome.

Judge Hand: Oh, yes. I did not suppose you would want to print them, but are you going to bind them up separately and put them together?

Mr. Seymour: I think we ought to do something of that kind.

Judge Hand: Yes, I think that will simplify access to it.

(2643)

Now, Mr. Wright?

Mr. Wright: If the Court please, we have in process of preparation some rather elaborate motions to strike out a very large part of the testimony that has been received here in various forms. Now, as to much of it we do not desire to press it or be heard on it; it is largely for record purposes.

Colloquy

Judge Hand: Oh, yes.

Mr. Wright: But as to some of these matters we do have a problem, I think, which does require some ruling or some indication by the Court as to the significance that attaches to certain testimony which has been permitted to go in here in order that we can limit the scope of our rebuttal evidence.

Now, as to that we would like to be heard, and we would like to be heard before we engage in the presentation of rebuttal testimony.

I might say that in so far as we are concerned, in our view of the case as it now stands, there is not in this record competent defense testimony which creates any material issue of fact that this Court needs to determine. Now, we shall, of course, present our views in detail as to the various aspects of this testimony in the form of a written motion and will support it with a written memorandum. But I would like an opportunity at some point, or perhaps now, if the

(2644)

Court is willing to devote some time to it, to have at least some interchange of ideas in the form of argument between ourselves and the Court as to the significance, or, rather, lack of significance and lack of competency, as we see it, of some of the material which has been received.

Judge Hand: Well, you might go ahead.

Mr. Wright: All right.

Let me first say that as we view the case now, of course, we think that we are right back at the point where we started, in that the fundamental, important question that has to be decided here is one of law, and that that question is the extent to which the copyright law justifies or excuses the practices in which the defendants have concededly engaged.

Colloquy

Now, let me give what I think is the simplest form of analogy to the situation that has been presented here in another field. Let us assume that you have two distributors of a commodity, two national distributors, and each of them controls a group of retail outlets; and each of those distributors makes agreements with his outlets, under which the outlets act as agents for the sale of his product to the ultimate consumer, and under which agreements he stipulates the price, or a minimum price, at which the product is to be sold.

(2845)

Now, up to that point you have no Sherman Act violation, no title passing until the ultimate sale to the consumer.

Now let us assume further that just two of these national distributors, each distributing a competing product through its own outlets in this manner, makes agreements with the outlets of the other of the same kind and character in which distributor A agrees with the outlets of distributor B as to the ultimate price to be charged by those outlets—or the minimum price, if you prefer—for the product of distributor A, and distributor B makes agreements of a similar character with the outlets of distributor A in which he too fixes the ultimate price to the consumer of his product.

Now, on that state of facts there is simply no question but that each of those distributors is a party to a price-fixing combination which is illegal under the Sherman Act regardless of any claims of a stabilized against a chaotic market, or claims that it is the most profitable way to do business, because you clearly have the elimination of price competition between the competing products of A and B as a result of express agreements between them and their controlled outputs.

Colloquy

Now, even in the cases of patented commodities, if the Court please, similar arrangements to that have
(2646)

been found by the Supreme Court to be illegal, the latest example, I think, being the Masonite case cited in our brief, where agency forms of agreement were used to control the ultimate price of the patented hardboard that was involved in that suit.

So that the question that really arises in this case, where it is perfectly clear that under any view of this testimony each of these theatre-owning distributors has made such agreements with the theatre outlets of the other distributors which control or which determine the price at which they shall be made available to the public—whether price-fixing of that kind can be justified under the Copyright Law; that is, if it cannot be justified under the Copyright Act, it is perfectly clear, under the Supreme Court cases in which price-fixing was involved, that you can't possibly justify combinations of that character by any evidence as to alleged reasonableness of that method of operation.

Now, our prima facie case was directed at showing the extent and actual use of this power of concerted price control that these people admittedly possessed through their ownership of the five largest groups of theatre outlets in the country, and their practice of making agreements with each other in which they determined not only the price at which their film shall be exhibited but the terms on which the films shall be

(2647)

made available to competing exhibitors.

We in the interrogatory answers offered a detailed picture of distribution in certain selected urban markets as to the 1936-1937 season, showing exactly the

Colloquy

way in which the arrangements the defendants make with each other were used to concentrate the major share of the film revenue coming out of the area in the theatres which were controlled by the defendants; and in our later interrogatories we expanded the data to give a picture as to the 1943-44 season in all of the cities of over 25,000 population. As to those towns we put in the evidence which show generally the first-run accounts during that season of each of these distributors and the clearance and admission price restrictions which were contained in the agreements with those accounts; and then we also, as to a single selected picture for each distributor, put in evidence the actual film rental and play dates of that picture and the clearance that that particular picture got on its first-run exhibitions in all of the cities over 25,000. We offered the data as to the first and second-run exhibition of the particular picture, again showing the film rentals, play dates and actual clearance and admission price provisions involved in all of the cities over 50,000; the first three runs in those over 200,000,

(2848)

and the first four runs in the cities over one million, in the five boroughs of New York City.

Again we offered that data to show the manner in which this market control that is jointly possessed and exercised by these theatre-owning distributors was used to concentrate the available film rental revenue in the early runs in a very large majority of those communities in theatres in which they owned these financial interests.

The general purpose of that data, of course, was simply to show that not only did they have this power to control this market, which, of course, is shown by these statistics as to the extent and the nature of their

Colloquy

theatre ownership and their position as distributors in the industry, but that it had actually been used to give them a prior and a preferred position in the exhibition in the industry.

(2649)

Now, we also offered in evidence, largely on the issue of intent, the various pooling agreements which they had made with each other whereby they had actually consolidated certain theatre operations where they actually ran theatres in nominal opposition to each other, and in those agreements, some of which are digested but all of which will be digested for your Honors before we get through with the case, there are provisions, such as those confining the acquisitions of new theatres by either party to certain territories and provisions as to how product is to be distributed or divided, all of which indicate in express terms what we think would generally be inferable anyway, that is, an intent as between these defendants not to operate theatres in competition with each other insofar as the business of licensing films is concerned.

Of course it is perfectly true that all pictures are in competition with each other for the customer's dollar and all theatres which are operated are in competition with one another for the customer's dollar in the sense that they do offer competing attractions, whether they are all owned by one operating group or by several, but I think it is perfectly clear, both from our testimony and from what has been set in here by the defense, that there actually is no competition between the theatres of these defendants when it comes

(2650)

to making film licenses or in determining the price at which the film entertainment is going to be made available to the public. And that basic fact, it seems to me, is beyond dispute on the record that we have here now.

Colloquy

Judge Hand: I think it is very hard for any of us to see how there is any violation in respect to production and why the whole thing does not come down to the arrangements for distribution and exhibition. You have almost admitted that—perhaps you haven't quite. I have never understood you to attempt to distinguish.

Mr. Wright: I have just attempted to point out that, as we view the case, it presents a problem in market control and the control of that market is largely determined by these arrangements that are made between companies acting as distributors and companies acting as exhibitors.

Insofar as the production end of the business goes, I suppose it is perfectly clear that anybody who has talent and who can make a successful picture is in intense demand, and that all of the people who own theatres are anxious to have those people make pictures and get their pictures distributed. In other words, what Mr. Raftery says about "there isn't anything wrong with the industry that more good pictures would not cure" is probably largely true in the sense

(2851)

that, as this industry is organized, these defendants, of course, cannot possibly get hurt by a good picture. They want to do whatever they can to have as many good pictures made as possible because, in exploiting them through their theatres, they profit from good pictures, no matter who makes them.

The aspect of the market control, however, which has been proven, which does disturb some so-called independent producers, and of course there is no unanimity of opinion on this question, is the fact that any producer's picture of course may be made or broken by the exploitation that it gets in

1950

Colloquy

the outlets which these people control, and that that control of the market in the hands of their competitors, of course, is a fact which does subject them to a serious competitive disadvantage. That is, as plainly as I can state it, what we think is involved here, insofar as producing pictures, as distinguished from distributing them and exhibiting them, is concerned.

Insofar as your independent exhibiting elements are concerned, of course there the immediate objects of all of these restrictive provisions which find their way into the license agreements which these people make with each other—and there let me say this, that it is perfectly true that in the areas, the limited number of areas, where these people do not operate theatres, the independent first-run theatres may and do

(2052)

receive privileges similar to those which these defendants receive in the areas in which they have concentrated their theatre operations. That, however, is a matter which is pretty much implicit, as we see it, in the possession of each of these distributors of large circuits of theatres; that is, each of them has a vested interest in what we call circuit discrimination, that is discrimination in favor of circuit theatres, as such, and that finds expression, as we proved in the *Shine* and *Crescent* cases, in dealing with large so-called independent circuits in the same way that it does with your affiliated circuits.

However, the problem that is presented here is different from that presented there in that in those cases they were simply dealing with the application of circuit buying power as such to the business of these distributors, whereas here, what you are dealing with is circuit buying power plus the affiliation of the dis-

Colloquy

tributors with theatres, which serve as conduits for the expressed agreements regarding discrimination.

Judge Hand: I do not understand what you are arguing, really, about. In these areas where independents have all the large theatres, are you picturing them as sort of contributory infringers? What are they claimed to be?

(2853) Mr. Wright: I am pointing out that I am making

no claims as to the independents who operate in areas where these defendants do not operate; that they are able to take care of themselves by virtue of the absence of the affiliated companies.

Judge Hand: You are making no claim even against these defendants there?

Mr. Wright: Yes, that is right.

Judge Hand: Oh, I did not know you were not.

Mr. Wright: I merely wanted to point out that the discrimination as to independent exhibitors again is largely limited to the areas in which they are so unfortunate as to find themselves in opposition to the theatres which are affiliated with the defendants in this case.

Judge Hand: Supposing these five defendants are distributing their pictures in a place where the independents control all the theatres, what do you say about that? Are you making any claim against them in respect to that?

Mr. Wright: No.

Judge Hand: You are not?

Mr. Wright: No, we are not. We are merely—

Judge Hand: In other words, your claim there would be against the independents.

Mr. Wright: Well, if there were any claim—

Colloquy

⊙ Judge Hand: I do not understand where you are
(2654)

getting in this thing, it is so extremely complex. What I understand was, you said even in those places the same kind of thing happened and there was the same taint on the part of somebody or other.

Mr. Wright: Well, insofar as the general control of the price structure by these defendants, that is, in any area, that is, even in an area that is wholly occupied by independents, they use a price fixing provision in the agreements to control and protect the revenue from those areas.

Now, to the extent that they do that concertedly they are, I think, in violation of the law there, but not because the price fixing or the other provisions are applied in such way as to discriminate between independent outlets and their own outlets because they have no outlets of their own in that area, but simply as a per se violation of the Act.

Judge Hand: I thought you might be claiming that they were the same as these three here that never came under the consent decree.

Mr. Wright: In those situations I think they are in that same position where they do not operate theatres.

Judge Hand: No better and no worse.

Mr. Wright: That would be about the size of it.

Judge Goddard: Do you claim there is a monopoly
(2655)

in production? I don't think I understand your position.

Mr. Wright: I don't think we do.

Judge Goddard: I beg your pardon?

Colloquy

Mr. Wright: No, we do not. As to the areas in which they operate theatres, the discriminations there, of course, are limitless in variety. You have discriminations as to playing position, as to clearance terms, in the application of these minimum admission price restrictions and as to rental terms. Now it is in connection with that question of the nature and extent of discrimination in—as against independent exhibitors—in the areas where these people operate theatres that I would like to press such motions we have directed at some of this general testimony of sales managers who have gotten on the stand here and simply gotten away with saying “Well, we do not discriminate between affiliated and independent theatres.”

I think it is a well established rule of evidence that anybody who wants to offer evidence as to facts, as distinguished from a general argument, is bound to produce and offer the best evidence at his command; that is, each of these sales managers, of course those companies have those license agreements in their files, they have elaborate data showing the terms on which they do business with independents and affiliated theatres. I do not say that anybody has to produce as primary evidence all or any part of the license agree-

(2656)

ments that he is talking about, or the original records which tabulate the material, but I do say that no proper foundation was laid here at any time to permit these sales managers to make the general statements that they did about the presence or absence of discrimination. You have seen how these people can tabulate and offer elaborate charts of any kind as to what they have done, and if they wanted to show, for example, that there was no discrimination in rental

Colloquy

terms, as to their theatres and the independent theatres generally, or in any particular area, it seems to me they were bound to at least offer to the Court some kind of factual summary statement of what the practice was and what they had actually done rather than just having some sales manager get on the stand and say that the practice is non-discriminatory, that we sell indiscriminately.

The Court: I thought you had complete access to their books and records and had seen whatever you wanted to and produced whatever you wanted to, and they were meeting this or attempting to meet it by some of this general testimony about their practice. If you have things in there which show that was not their practice, all right.

Mr. Wright: If the Court please, all that we attempted to do—

(2657)

Judge Hand: I suppose that you claim very earnestly that you have things in there which show that that was not their practice.

Mr. Wright: All that we attempted to do in the prima facie case was simply to indicate what appeared to be prima facie discriminations. Insofar as testimony is directed to the explanation or rationalization of any particular discrimination, we have no quarrel with it, but I do not believe that evidence of that character can be made or that the burden of going forward can be shifted by a party who has the evidence at his command, ignoring factual evidence and simply getting on the stand and giving a general conclusion as to a general practice.

Of course it is perfectly true if we want to go in and examine twenty thousand agreements; I suppose

Colloquy

we have the privilege of doing it, but I submit that it is extremely prejudicial to permit them to impose a burden of that character on us simply by having these men get on and say "We don't discriminate" without making any attempt to analyze or present a factual analysis of what they have got in their own files. I do not see that the mere fact of access through subpoena or otherwise is sufficient to excuse the reception of evidence from them in that form. Of course if all the evidence is received for is just general evidence of good intentions, then you do not have any

(2658)

problem of competency. Of course, it seems clearly irrelevant and immaterial, however. But if that kind of thing is to be accepted as competent evidence, and I do not think it can be without violating the established rules applicable to this court, we have a much different burden in determining what kind of rebuttal we ought to put in than, I think, we have as a matter of law.

I will say generally, on our rebuttal, as far as argumentative testimony is concerned, we do not propose to meet it with other argumentative testimony, we will argue the case ourselves, and insofar as any testimony that we do offer, we shall, I think, attempt to confine it to documentary form insofar as we can. But in determining the scope of that documentary testimony, that is, what and how many contracts to put in, we are faced, I think, with a problem that has been created here, and I think—in the first instance, I don't want to be misunderstood as thinking that there was any error in admitting it, to have it incorporated in the record, I think we all wanted to have in the record everything that these people wanted to offer, so that we would have a record on which there could be

Colloquy

final disposition, but I think the point has been reached where we pretty much have to know what, if any, significance the Court is going to attach to

(2659)

that kind of conclusory evidence which was offered and received without any proper foundation, as far as I can see.

Judge Hand: I do not see myself that it is tremendously important.

Mr. Proskauer: Your Honor, we cannot quite hear you.

Judge Hand: I am not tremendously moved myself by a lot of testimony from people from a company that they always give everybody an equal chance, and there was no preference there, and all that sort of thing, if you have some stuff which points the other way, and it is clear enough that is your burden, whether by oral testimony of documentary testimony or otherwise, it is certainly your burden, and you are merely objecting to our giving any weight whatever, or paying any attention, even though your testimony should prove to be weak, to general statements by their officials as to their practice. I rather think we could not do that; that that would be an erroneous ruling on the admission of evidence. I do not think, if you have a good case otherwise, by the practice which you have shown that they had actually from these documents, that they are going to meet it by coming in with testimony that they always were fair, non-discriminatory, and, in general, lovely fellows. But even so, if there is anything there in the way of

(2660)

doubt on either side in this testimony, I should think witnesses could be called to say what the practice was. Maybe your documents contradict it or seriously dam-

Colloquy

age it, but to say that what they were doing, that their custom in trading was non-discriminatory is incompetent for any purpose, I don't think it is. Do you?

Judge Bright: Is what?

Judge Hand: Is incompetent. I don't think that it is. No, we will have to let that stuff stand. I admit that there are many things here; for instance, dealing with these arbitration records, I have no doubt they would throw some light on the character of the litigation. What real evidential force they have, if any, I greatly doubt. And I know the only reason or the best reason I could give for letting in something which it is my almost invariable individual practice to let in, if there is any possible chance for its admissibility, in a suit without a jury, was based on the theory that it had some informative, if not evidential value—a little like an auditor's report; it was to aid the Court—that the parties were there and they were at liberty to overthrow it any one of them.

Mr. Wright: I think it is quite apparent, if the Court please, that we can call no witness who can
(2661)

testify to the general practice of any of these companies. We can procure certain license agreements which we will offer,—

Judge Hand: Yes.

Mr. Wright: —and which we think show some of these discriminations. There are, as I said, in our prima facie case a number of discriminations which haven't specifically been called to the Court's attention.

Judge Bright: We do not know what they are.

Mr. Wright: I beg your pardon?

Colloquy

Judge Bright: We don't know what they are.

Mr. Wright: I think we showed, for example, in the examination of one witness, as to the rentals which were paid for runs in, I think, third or fourth run Philadelphia, that there was no uniformity whatsoever as between the Warner theatres and the independent as to the rentals they were charging for the same run.

On this problem of comparison, again, I would—I attempted to follow your Honor's questioning and we are prepared to make any kind of specific comparison that the Court is interested in. "There are, of course, many things that can be done along that line, compare prior runs with later runs or pictures on the same run, but in my view, what you come up with, I think, is a fairly obvious conclusion in the instance, that necessarily, when you make one of these deals, you discriminate in some respects every

(2662)

time you make a film license, and that the general testimony to the effect that "We don't discriminate" just has no meaning in the face of the fact that each of these is a bargained agreement and your terms will necessarily vary with the bargaining strength of the parties to the agreement.

That is, really, the question that, as I see it, we are faced with on rebuttal, is how far to attempt to elaborate on what seems to be, to us, an obvious fact or a fact which is inevitable in any consideration of the way the business is done, and I would like to direct any further evidence on that point into the precise channels, if any, that the Court has in mind. If we could be told as to what, if any, kinds of rental discrimination the Court is interested in, I shall attempt to make a comparative showing.

Colloquy

Judge Hand: You are almost making the argument, apparently, that to bargain at all is discriminatory. I don't understand it.

Judge Bright: I have just been wondering whether the Sherman Act prevents you from dealing with a man who has \$50 on a different basis than one who has \$5.00.

Mr. Wright: Not at all. I think not only is some discrimination implicit in every deal that is made but that discrimination which simply gives regard to the

(2663)

results from competitive bargaining on a theatre by theatre basis, does not violate the Sherman Act at all, and we do not make any such contention, but it seems to us, again, the testimony of these witnesses is so unlimited and so general in character that—

Judge Goddard: Most of these contracts, according to the testimony, as I recall, were made theatre by theatre and not in groups, isn't that the testimony?

Mr. Wright: I think your Honor will find in the interrogatory answers many instances where the statement is made that they cannot tell us what the rental paid by a particular theatre was because there was either a flat rental deal for a large number or some formula deal where the rental has not yet been computed.

That problem of how far to go in putting into the record additional contractual material is one which I think we need some help on from the court. As the record stands, I do not know what significance the Court attaches to these statements that have been made at all. I would go further and I would say that insofar as our tabulations are concerned, tabulating this interrogatory material, we, again, want to limit what we offer insofar as we can to tabulations which

Colloquy

will satisfy the Court's curiosity rather than just give employment to ourselves.

Judge Bright: Don't you think the burden is on
(2664)

you to center your fire rather than to scatter it?

Mr. Wright: I agree that the burden is on us to center our fire but I say that the manner in which the defendants have been permitted to scatter theirs has really given us a burden that, as matter of law, we should not have.

Judge Bright: When you are trying to shoot at a flock of pigeons, you don't use a choked barrel.

Mr. Wright: That is quite true.

Judge Hand: I should think you ought to show or to have shown, whichever may be the case, in what way there has been discrimination and to what extent, that is your burden absolutely, and somebody has a right, who is an officer, to come back and say, "Well, in our negotiations we treated Trojan and Tyrrhenian without discrimination. The independents and the others were treated in the same way." Very likely that isn't so; you say that your evidence shows plainly that it isn't so.

Mr. Wright: That is right.

Judge Hand: That does not say that they cannot talk about it. There are lot of transactions here, doubtless, that may be entirely colored by their interest and wishful thinking, but are outside of completely recorded transactions that represented consummated deals. And you have, you believe, I imagine, a mass of documents and transactions show-

(2665)
ing that that is not so.

I cannot tell you, without considering the thing further, what weight is to be attached to anything. How can I? How can any of us? This is not a simple

Colloquy

case, it has complicated facts and varying agreements and all kinds of varying relations.

Mr. Wright: Of course I think, if the Court please, that it is simpler than it has been made to appear by the treatment which it has got from the defendants. That, of course—

Judge Hand: That may be so.

Mr. Wright: —is a problem we have in these cases. If the defendants can make the issues sufficiently complex, they generally prevail; if we can keep them simple, we prevail. What I am trying to do here is refrain, if I can, from further cluttering the record with elaborate documentary rebuttal testimony.

Judge Hand: I shouldn't think, if your evidence was good enough, that it was helped by mere weight of numbers. It is absolutely impossible for us to sit here and give any safe conducts as to what you should put in.

Mr. Wright: May I do this? We are preparing a motion to strike, which we shall want to file anyway, and I would like to submit with it a brief memorandum, if the Court would receive it, referring to authorities which I think can support the position that I

(2666)

took, but I would assume that in any event we would go ahead and prepare such rebuttal as we think we need, without waiting, that is, for the Court's ruling. We would, however, appreciate an opportunity to examine what has gone in here in considerable detail in order that we can cut what we will offer down to the very minimum that we think is essential to make a full case.

I do not know what your Honor's plans are as to when you want to sit. We could get this motion into your hands, I think, by the first of the week—motion and memoranda.

Colloquy

Judge Hand: I do not think we care anything about those motions. You ought to make them on account of your record, of course, but we are not going to spend time striking out this and striking out that. It is impossible. We would not add anything to the situation that would help any, before we got through.

Judge Goddard: Couldn't pass on it.

Judge Hand: No. I wouldn't spend much time on these motions, if I were in your place, except to make the kind of record which you think is proper in case you should not get what you wanted out of this court and should want to take an appeal.

Mr. Wright: Well, of course, I should like to say,
(2867)

for the most part, that is the—

Judge Hand: The defendants, of course, have made some motions already. Very likely they will make some more to the same desirable end.

Mr. Wright: What is the Court's pleasure as to when you would like to have us begin whatever rebuttal we have?

Judge Hand: When would you be ready to begin?

Mr. Wright: Your Honors, I take it, are not sitting Monday?

Judge Hand: No.

Mr. Wright: I would suppose we would be ready with something by the end of the week. I think there are some odds and ends to pick up too with some of these other things. Perhaps Wednesday or Thursday?

Judge Hand: Wednesday is all right. I don't want to really, push any of you here too much. You have collaborated splendidly in shortening this case. I don't want people sitting up all night and killing themselves, but, as I manifested at the beginning, I do not want this case to take the course of so many Sher-

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Colloquy

man Antitrust Act cases take—just grievous, to everybody.

Mr. Wright: We don't want to do that either.

Judge Hand: No, you haven't. You have done awfully well.

(2668)

Mr. Wright: Can we proceed Wednesday with this understanding, that, of course, we have numerous matters to clear up as part of the defense case here, that we know we want to go ahead with now, and it may be that after we have those matters finished, we might ask for another short recess before actually closing, but I think we could use that time.

Judge Hand: Would you rather begin Thursday? Can you go right on then?

Mr. Wright: As I say, I cannot give the Court assurance now as to how long it will take us to make our final study of this record. I know that there are some things we can go ahead with next week. That is why I thought it might be desirable to use some of that time.

Judge Hand: We will adjourn until Wednesday at ten-thirty.

Mr. Proskauer: Your Honors, before we adjourn, I have sat silent a long time here. I don't want to go into a long recess with any impression in the Court's mind that our chief reliance in our testimony was on those general denials.

Judge Hand: I never supposed so. I take these recitals and affidavits, that people would testify to—

Mr. Proskauer: They are for the protection of our record.

(2669)

Judge Hand: They never did me any good, really, and I have them particularly in admiralty all the time.

1964

Colloquy

Mr. Proskauer: Of course.

Judge Hand: We all know that. I suppose they have to make some kind of record—all of you do—least acquiescence should be weighed against you.

Mr. Proskauer: I want to make it clear that our contention is that we have negated conspiracy and shown there is no issue of fact here by very direct and specific evidence.

Mr. David: I want to also suggest that this is the first time I have ever heard, in a quasi-criminal case, where the defendants took the stand and, with uplifted hand, said "I am not guilty," the prosecuting officer move to strike his testimony.

Judge Hand: Wednesday at ten-thirty.

(Adjourned until Wednesday, November 14, 1945, at 10:30 a. m.)

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Colloquy

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New York, November 14, 1945;
10:30 o'clock a. m.

Trial resumed.

Mr. Caskey: If the Court please, at the session on Friday Mr. Pride offered the stipulations of the four division managers of National Theatres Corporation, and, as I understand it, they were received subject to any suggestion which counsel for plaintiff might have. If there are none they can now be incorporated in the record.

Mr. Wright: Of course, as far as suggestions are concerned, our suggestions will take the form of a motion to strike a large part of that material, simply as we have before; but there is not any agreement between us as to what the affidavit should contain.

Mr. Caskey: And I now ask to have the stipulation of Charles P. Skouras, who is the president of National Theatres Corporation, a defendant in this case, incorporated into the record.

(The five stipulations referred to are as follows:)

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(The affidavit of HAROLD J. FITZGERALD is as follows:)

"IT IS HEREBY STIPULATED by and between counsel for the plaintiff herein and counsel for the defendants, Twentieth Century-Fox Film Corporation and National Theatres Corporation, that if called as a witness in this proceeding HAROLD J. FITZGERALD would testify as follows:

"I am a resident of Milwaukee, Wisconsin, having resided there all my life. I am engaged in the motion picture theatre business and have been engaged in that business continuously since 1915. I am now and since 1933 have been the president and operating head of Fox Wisconsin Theatres, Inc. (hereinafter referred to as 'Fox Wisconsin'), a Delaware corporation, having its principal office and place of business in Milwaukee, Wisconsin. All of the stock of Fox Wisconsin is owned by National Theatres Corporation, a defendant in this proceeding.

"Fox Wisconsin is interested directly, or through corporations the stock of which is owned by it, in the owning, leasing and operation of 66 motion picture theatres located in various cities and towns in the State of Wisconsin and in the upper peninsula of Michigan. All of such theatres are located in what

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is generally known as the Milwaukee Exchange territory, by which is meant that films are supplied to such theatres through the exchanges maintained by the respective distributors in Milwaukee.

"At the present time, 61 of these theatres are in active operation, 5 are not. For the most part, these 5 theatres are not being operated because various

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physical deficiencies make them unsuitable for use as theatres.

"I am familiar with the allegations contained in the plaintiff's complaint herein.

"I. GROWTH AND DEVELOPMENT OF MOTION PICTURE THEATRE BUSINESS IN MILWAUKEE EXCHANGE TERRITORY UP TO TIME OF ACQUISITION BY FOX FILM CORPORATION OF THE PREDECESSOR OF FOX WISCONSIN.

"The development of the motion picture theatre business in Milwaukee, Wisconsin, as well as in most of the other larger towns in which Fox Wisconsin now operates, is linked with the story of two residents of Milwaukee—John E. and Thomas Saxe, who were pioneers in the exhibition business in the entire territory. These men had become interested in the business as early as 1904. Their entry into the business was through the acquisition of a nickelodeon in payment of a debt. They opened other five cent store front theatres. They were the first to open an enlarged type of theatre charging ten cents. They had confidence in

(2673)

the future of the business. They ploughed back into new and improved theatres the profits of their original ventures.

"I first became associated with the Saxe organization in about 1920. At that time the Saxe brothers were operating approximately 20 theatres in the City of Milwaukee and a few in other outside communities. For the most part these theatres had either been constructed by them or for them and represented the most advanced theatre operations in existence in Wisconsin. The theatres, of course, did not begin to compare physically with today's better theatres. For the most part they were relatively small and otherwise inadequate but they were the 'quality' theatres of that pe-

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riod. Other theatres were in competition with them. Some of such other theatres were being operated as units by several individuals.

"In the period between 1920 and 1927, there was great activity in the theatre field. The motion picture industry had developed by leaps and bounds. The quality of the product had immeasurably improved. The power to attract public patronage had greatly increased. These factors were reflected in elaborate plans on the part of existing theatre operators to enlarge and improve their theatres to satisfy public demand and to keep abreast of these developments. In

(2674)

the large metropolitan cities, such as Milwaukee, theatre construction was undertaken in a large way. This marked the beginning of the construction of the so-called 'de luxe' theatres, with large seating capacities, luxurious appointments and requiring very substantial investments.

"The Saxes were the leaders of this in Milwaukee. They entered upon the construction of such theatres as the Wisconsin (still the finest theatre in the State of Wisconsin). They likewise constructed the Uptown and the Garfield and arranged to have constructed for them the Oriental and Tower theatres. These 4 theatres were large de luxe neighborhood houses. Together with the Modjeska theatre they represented a group of superior theatres, each, in a competitive neighborhood area of Milwaukee and each affording to the public theatre accommodations which were unequalled in neighborhood theatres in any city of comparable size in the country. Moreover, they also entered upon the construction of similar fine theatres in representative communities in the State.

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"These theatres were built by the Saxe companies (or built by others for them on the basis of leases guaranteed by the Saxes) because of a definite realization that if they were to continue to have a profitable exhibition company it was necessary for them to keep abreast of the times. It was necessary for them

(2675)

to have fine theatre facilities to accommodate the public and to provide appropriate exhibition facilities for the productions that were then being distributed by the producing companies. If they did not supply these facilities, other progressive exhibitors would do so and relegate them to a position in which their business would be outmoded. The theatres in question were costly. It was necessary in a number of instances to finance them with bond issues which were generally distributed to local investors. The risks assumed were large. They were only assumed as necessary business measures required to keep pace with an expanding industry.

"This development in the theatre business was, of course, not confined to the Saxes. Other interests who had been engaged in theatre operation in Milwaukee and in other towns throughout the State likewise developed their properties. In all, from about 1920 to 1927 more than 43 theatres were built in the City of Milwaukee alone, most of them of substantial size. 16 of them had more than 1,000 seats and 7 of them had more than 1,500 seats. The great majority of them were built by individuals having no connection with the Saxes or any other circuit of theatres.

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"Throughout this period the Saxe circuit developed entirely on its own, with no financial assistance from any producer or distributor of motion pictures. Up to 1927 the only distribution company having any

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interest in theatres in Wisconsin was Universal, which, as early as 1921, had acquired the Alhambra theatre in Milwaukee.* Universal had expanded its theatre holdings by acquiring several groups of theatres theretofore operated by certain individuals and it also built, or otherwise acquired, theatres in several other towns in the State, building a de luxe theatre in Kenosha, Racine and Sheboygan, respectively, the theatres in Racine and Kenosha being directly competitive with the Saxe operations in those communities.

"By 1928 there were 77 theatres in the City of Milwaukee, a number of which were being operated by the Saxes.

"In addition, the Saxes were also operating theatres in the Cities of Appleton, Beloit, Fond du Lac, Green Bay, Janesville, Kenosha, Marinette, Menasha, Neenah, Racine, Waukesha and Wausau. They had constructed the Capitol theatre, in Madison, with a seating capacity of 2,240. They had under construction a theatre in Kenosha and one in Oshkosh.

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"By reason of my connection with the Saxe company, I was familiar with the events and situations which led to the construction and acquisition of the Saxe theatres. I was general manager of the company from 1925. I can definitely state that the theatre construction which occurred in the period was occasioned solely by an endeavor on the part of the Saxe company to continue a profitable business, with the knowledge on its part that, unless it was successful in affording the public and the producers adequate facilities and

*This theatre had formerly been operated by the Saxes but Universal offered a greatly increased rental to the landlord and secured the property.

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adequate outlets, the economics of the situation would destroy the enterprise. There was no thought or intention of creating a situation which would exclude competition or prevent others from engaging in the theatre business. The basic consideration was the maintenance of an established business along progressive lines.

"Beginning in about 1924, there became apparent the greatest interest on the part of distributors of pictures to secure a position in the exhibition field in Milwaukee.

"In so far as the Saxe theatres were concerned, there were many propositions submitted for the purchase of this circuit. Solicitations were made by brokers and promoters, some purporting to act for (2678)

major producers or other large interests and some concealing their principals. In the period between 1925 and the end of 1927 definite negotiations were had with the following:

"William Fox, who was negotiating for the direct acquisition of the circuit through an agent, A. C. Blumenthal;

"Hayden, Stone & Co., bankers, who had financed Wesco Corporation, which was a holding company interested in many theatres on the West Coast;

"Paramount Publix Corporation;

"Balaban & Katz Corporation; and

"Ruben & Finkelstein, who operated theatres in Minnesota.

"Negotiations with Hayden, Stone & Co. for the acquisition of the circuit by Wesco Corporation resulted in the development of a formula for a sale in

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the summer of 1927 and the agreement was closed December 1 of that year. The Saxe circuit was purchased by a company known as Midwesco, which was a wholly owned subsidiary of Wesco Corporation. The price paid was \$900,000 in cash and 17,500 shares of the stock of Wesco Corporation, plus an option to the Saxe interests to purchase an additional 22,500 shares at \$40 per share. In 1928 Fox Film Corporation acquired all of the stock of Wesco Corporation. At that time the stock held by the Saxes was exchanged, share for share, for the stock of Fox Film Corporation

(2679)

and a cash consideration of \$100,000 was paid to the Saxe interests to cancel their option.

"As indicated by the foregoing, the Saxe theatres were, when they became affiliated with Fox Film Corporation in 1928, an established circuit of theatres, with the development of which the producing company had no connection. It was acquired by Fox Film Corporation in a highly competitive market.

"II. TRADE PRACTICES AND COMPETITIVE CONDITIONS UP TO TIME OF AFFILIATION.

"As stated above, I became general manager of the Saxe theatres in 1925. In this capacity I had supervision and control over all phases of the operation, including the licensing of pictures for the theatres. I was wholly familiar with the methods of licensing and the practices followed with respect thereto.

"In 1928 there was definite competition in the operation of first run theatres in Milwaukee. The Saxe circuit was operating two theatres, the Wisconsin and the Strand, as first run theatres. Universal was operating the Alhambra. The Riverside theatre, with a large seating capacity, had been built in 1926 and was

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being operated by the Keith-Albee-Orpheum circuit, principally as a vaudeville theatre, but increasingly more as a motion picture theatre. The Palace theatre (2680)

was also being operated by the Keith-Albee-Orpheum circuit as a vaudeville and motion picture theatre. The Garden theatre was being operated by an independent.

"The Saxen had, as stated above, constructed a number of de luxe first run neighborhood houses which were playing as first run theatres in their respective competitive areas, although in other neighborhoods there were first runs operated by two independents, as well as a neighborhood first run operated by Universal.

"The situation with respect to the licensing of films, and the runs and clearances involved, were much the same at that time as they are today. Without exception, at that time, the first neighborhood run was licensed by the distributors to the theatres which were the finest, most commodious, and most capable of producing revenue for the distributor in the particular zone involved. Then, as now, no question of affiliation or circuit connections determined that choice.

"As to the first run downtown theatres, the same situation existed. The entire system of licensing runs, with appropriate clearances attaching to each, is nothing new or unique. It existed then, as it does now.

"In licensing film at the time—and this was one of (2681)

my principal responsibilities—I naturally endeavored to license the best product available to the extent necessary to supply the demands of the theatres. While the number of first run downtown outlets was fewer at the time than at present, partly because of the playing of vaudeville in the Riverside and the

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Palace theatres and partly because the large Downtown Warner theatre had not been constructed, nevertheless the ability to secure film was predicated upon the physical characteristics of the theatre for which it was to be licensed, plus an ability to arrive at satisfactory terms with the distributor.

"Moreover, in so far as licensing provisions generally are concerned, the same procedures were in effect at that time as at the present. It was not uncommon for pictures to be licensed on a percentage-of-the-gross basis, although such contracts were not as generally used as at the present time. Then, as now, minimum admission price provisions were inserted in the film contract. Clearance was negotiated on the basis of the proper period of protection which the distributor and the exhibitor could agree upon for the particular competitive situation involved.

(2682)

"III. DEVELOPMENTS FROM 1923-1933—THE PERIOD FROM THE ACQUISITION BY FOX FILM CORPORATION THROUGH THE BANKRUPTCY AND REORGANIZATION OF THE MIDWESCO CIRCUIT.

"In the period between 1928 and 1933, a number of significant changes took place in this competitive area. At the time when the Saxe interests sold out to Midwesco, they had developed plans for the erection and acquisition of a number of other theatres, which plans were consummated. By 1933, Fox Wisconsin was operating three first run theatres in Milwaukee, the Wisconsin, the Strand and the Palace (which by that time was operated almost entirely as a motion picture theatre). The Riverside theatre was being operated as a motion picture theatre by RKO. The Warner company had entered into the exhibition busi-

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ness in Milwaukee. It had erected the large 2,000-seat Warner theatre downtown, and had acquired a number of other theatres, both in Milwaukee and throughout the State. These Warner acquisitions represented purchases of certain theatres operated by Universal up to 1931, as well as acquisitions of other theatres from various independent operators. At the beginning of 1933 Midwesco had approximately 15 theatres in Milwaukee; Warner Bros. had approximately 10 theatres; RKO had one theatre; and there were 45 operating independent theatres.

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"Outside of Milwaukee, Midwesco had also carried out preexisting plans of the Saxs with respect to the construction and acquisition of new theatres, to the point where, by the end of 1932, Midwesco had or was interested in the operation of 42 theatres in other communities.

"In other words, it had a total of 57 theatres in the Milwaukee Exchange territory, as compared with 61 operating theatres today.

"Comment should also be made as to the development of the Warner company operation in the period between 1931 and 1933. Beginning in 1931, at a time when Midwesco was affiliated with Fox Film Corporation, the Warner company entered into vigorous competition with it in Wisconsin. In addition to the first run and the first neighborhood runs in Milwaukee, which are referred to above, it acquired first run theatres in direct competition with Midwesco in other Wisconsin cities, including first run theatres in Appleton, Kenosha, Racine and Sheboygan.

"Throughout 1932 Midwesco lost hundreds of thousands of dollars in the operation of its theatres. In this year it felt the full effect of the depression. Its

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fixed charges, resulting from burdensome leases, particularly those on the large de luxe theatres which had been built in the late '20s, and other heavy items of overhead, made it impossible for it to continue operations on its then existing setup. This was in spite of the fact that every effort was made to reduce its leasehold obligations and the fact that large additional capital sums were invested in the company. Accordingly, in February, 1933, it filed a petition in bankruptcy. In the subsequent reorganization of the company, now Fox Wisconsin Theatres, Inc., many important developments took place, some of which will be referred to later in this statement.

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IV. DESCRIPTION OF PRESENT CORPORATE STRUCTURE AND GENERAL BUSINESS PRACTICES OF FOX WISCONSIN.

"I now turn to a description of the existing structure and method of operation of Fox Wisconsin.

"I have stated above that all of the stock of Fox Wisconsin is owned by National Theatres Corporation, which also owns the stock of a number of other companies engaged in the operation of theatres. Fox Wisconsin, however, operates as a separate autonomous business entity. All of the directors except one are residents of Milwaukee, the directors being Charles P. Skouras, George H. Uihlein (who is not an officer or employee of either Fox Wisconsin or National The-

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atres Corporation), L. S. Clemons, an attorney in Milwaukee, E. M. Donnelly, the treasurer of Fox Wisconsin, and myself. The management and operations of the theatres of Fox Wisconsin are directly under my supervision and control, as are the general policies of

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its operation. The executives of National Theatres Corporation, by reason of that company's financial interest in Fox Wisconsin, naturally pass judgment upon and exercise a certain amount of direction on all important financial transactions, such as new theatre construction, acquisitions, renovations or other large capital commitments.

"At the present time, Fox Wisconsin has 14 wholly owned subsidiary corporations and one 50% owned subsidiary. There are several reasons why it has this corporate structure. In the first place, with respect to the leases of certain theatres, it was considered desirable to insulate Fox Wisconsin against liability by having these leases held by separate corporations. This was done with the express understanding on the part of the lessors of the various theatres that the particular subsidiary to which the theatres were leased was alone responsible. In the second place, certain tax advantages could be realized under this corporate structure, all of which were expressly sanctioned by the Internal Revenue Code and have been approved by

(2686)

the Bureau of Internal Revenue. In the third place, in certain instances the lessor or owner of the theatre participated in the profits of the operation, either by way of additional rental or direct sharing in the profits. For this reason, it was desirable to have a separate corporate entity conduct the operation, and in certain instances this was done at the suggestion of associates who were interested only in their own theatres.

"One of the wholly owned subsidiaries of Fox Wisconsin is Fox Wisconsin Amusement Corporation. This is a service corporation for all of the theatres in which Fox Wisconsin and its subsidiaries are inter-

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ested. Fox Wisconsin Amusement Corporation performs all of the activities incident to the actual operation of the theatres, including the licensing and booking of films, accounting, maintenance of the theatres, establishing of policies, planning and arranging for advertising, purchasing supplies, procuring and maintaining of insurance, and other similar functions. In the performance of these services it employs approximately 100 employees. It maintains offices in the Var-sity Theatre Building in Milwaukee, where it has extensive office space comprising two floors of a modern building. It has a large projection room, where the motion pictures of all producers are screened, and

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various other facilities useful in the operation of the-
atres.

"Its organization is divided into various depart-ments. One department is known as the Buying and Booking Department. It consists of 12 employees, including buyers, bookers, statisticians and experi-enced film clerks. The general function of this de-partment is to negotiate licenses for the pictures to be exhibited in the theatres and to arrange for their booking (playing dates) after the films have been licensed. The personnel comprising this department is highly skilled and trained in this work. They must have special ability to judge the quality of such pic-tures. They must have a knowledge of the theatres operated by the company and the communities in which they are located. They must have an accurate evaluation of the tastes of the theatre-going public to which each theatre caters. In other words, to carry on their functions effectively they must know the box-office quality of each picture produced, gauging it in the light of the tastes of the public which patronizes

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each theatre. For example, a 'crime' picture, such as 'Dillinger', would have little appeal in the Downer theatre in Milwaukee, which is situated in a fine residential section. The same picture would have great drawing power in the Riviera theatre, which is located

(2688)

in an industrial neighborhood. A so-called 'quality' picture starring Greer Garson, for example, would have no particular drawing power at the Miller theatre in Milwaukee, where action pictures have been established as having the greatest box-office appeal.

"A. Business Practices Relating to the Licensing of Films.

"In so far as concluding contracts for the exhibition of motion pictures in its theatres is concerned, Fox Wisconsin enters into film contracts for theatres in which it is interested and only those theatres.

"In the case of the companies which are parties to the Consent Decree, negotiations for license agreements occur with respect to each block of pictures offered by each such company. As to other producers, the negotiations generally relate to the entire season's product.

"Prior to the entry of the Consent Decree, substantially all distributors licensed their entire season's product at one time. National Theatres Corporation then maintained a central office in New York, where negotiations were generally conducted with all the distributors for the licensing of pictures in all of the theatres in which National was interested. Licensing arrangements were then generally arranged at this central office. Even under this procedure, however,

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the licenses were made with respect to each individual theatre. In the latter part of 1941 there was a com-

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plete decentralization of the so-called Buying Department of National Theatres Corporation.

"In certain instances a distributor, who is a party to the decree, may negotiate license agreements with another subsidiary of National Theatres Corporation before it conducts any negotiations relating to Fox Wisconsin's theatres. For example, a distributor might negotiate with Fox West Coast in Los Angeles with respect to theatres operated in Southern California. In the course of those negotiations, a general formula might be agreed upon for a particular group of pictures for exhibition in the theatres of Fox West Coast. This formula might provide for a film rental based upon certain percentages applicable to each picture, which percentages would apply to those particular theatres which played the pictures on a percentage basis, rather than on a flat rental basis. Later the general formula previously agreed upon for the Fox West Coast theatres might be adopted for Fox Wisconsin's theatres or might be used as a general basis for negotiation. Such prior arrangements which the distributor had effected with any of the other subsidiaries of National Theatres Corporation would, however, represent no binding commitment as far as

(2690)

Fox Wisconsin was concerned.

"Furthermore, as between Fox Wisconsin and the other operating subsidiaries of National Theatres Corporation, there is, of course, full exchange of information between the executives of the respective companies. This information relates to all matters which would be of mutual interest to the executives of these companies, including the terms upon which films have been licensed, the box-office value of particular pictures in particular territories, developments in theatre

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maintenance and all new phases of theatre operations generally.

"When the representatives of the distributors and the representatives of Fox Wisconsin have arrived at a satisfactory agreement, the proposed contract is then submitted to me for my approval. No license agreement for films can be concluded without specific delegation of authority from me or without my express approval. In the negotiation of these licenses, separate consideration is, in practically all instances, given to each particular theatre in which Fox Wisconsin is interested and a separate and specific deal made on the basis of each individual theatre.

"Moreover, in a certain number of situations, Fox Wisconsin has associated with it individuals who participate in the profits of the operations of certain

(2691)

theatres which are owned by them or in which they otherwise have an interest. These individuals have no other connection or affiliation with Fox Wisconsin, or any other company engaged in the motion picture business. As to these theatres, these associates have the right to approve any film license agreements which are negotiated for these theatres. The only film deals which they would approve would be those negotiated solely for the best interests of their theatres.

"Fox Wisconsin enters into film license agreements with all distributors of worthwhile pictures, including a number who are not defendants in this case, such as Republic, Monogram, PRC and others. The general practice and procedures outlined above apply with respect to all negotiations.

"As to the terms upon which the pictures are licensed, there is no standard formula for every theatre, nor is there any standard formula applicable to each

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theatre. As to certain of the theatres of Fox Wisconsin, all of the license agreements for those theatres provide for a certain fixed amount as film rental. However, these flat rental deals vary with respect to each company whose product is licensed, depending upon the quality of the product. For

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certain pictures one of such theatres might pay \$100 flat rental, while for another picture it might pay \$20. In a number of other theatres, the license agreements provide for film rental determined in one way or another by a percentage of the gross business done by the theatre. Here, again, however, there is no standard formula or arrangement which is applied to these so-called 'percentage deals.' They vary greatly in form and substance as to the particular distributors involved. With one distributor, the film rental might be predicated solely upon a specified percentage of the gross receipts. As to another distributor, the license agreement might provide for what is called a 'sliding scale' arrangement, under which the percentage of the gross receipts to which the distributor is entitled would vary, depending upon the volume of business done by the theatre on the particular picture. Other formulae are also used. This all depends upon the particular negotiations with the particular distributor.

"All of these arrangements simply represent a measuring rod for the determination of the film rental which is to be paid. They are negotiated solely with an eye to arriving at a fair deal for both the distributor and the exhibitor. The various refinements which oftentimes are linked with a straight percentage deal are used only for the purpose of enabling the distributor

(2693)

to receive a higher percentage of the gross on pictures

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which are outstanding box-office attractions and to reduce his percentage upon productions which have less drawing power than anticipated at the time when the license agreement was made.

"At the time when negotiations are had for the licensing of the pictures and the terms upon which they are to be licensed are under consideration, the matter of clearance is also considered. This element of any licensing arrangement is of vital importance to the distributor. It also very directly affects the exhibitor. If Fox Wisconsin at the Wisconsin theatre in Milwaukee undertakes to pay a distributor film rental based upon a high percentage of the gross receipts and proposes to charge 85¢ admission, it is certainly interested in the clearance which it will have on that picture over the first neighborhood run thereof which such distributor might license to a competing subsequent run theatre. The clearance, obviously, has a definite effect upon the capacity of Fox Wisconsin to secure patronage at its top admission price.

"Generally speaking, the actual negotiations as to clearance do not take place with respect to each block of pictures which is licensed. This is because of the fact that, once a fair and reasonable clearance has been determined upon by the distributor and exhibitor, it tends to become fixed and, in the absence of

(2694)

any changed circumstances or conditions, will ordinarily be the same in a series of contracts. There are exceptions, of course, to this.

"My attention has been directed to the claim of the Government that the distributor and the affiliated theatres agree upon clearance and minimum admission prices for the purpose of fixing the actual price which a subsequent run exhibitor may charge and that

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such factors are agreed upon for the purpose of improperly subordinating the freedom of action of such subsequent run exhibitor. This I flatly deny. In instances where my company is operating a prior run theatre, I have no concern of any sort as to the maximum price which my subsequent run competitor charges. It is my desire that he charge a price which is as close to the price which I charge in the prior run as he considers feasible. Generally speaking, if my theatre operates first run and charges 60¢, the subsequent run exhibitor who plays 28 days after my first run theatre and charges 50¢ would be less competitive than a subsequent run which plays on the same availability but charges only 30¢.

"Consequently, not only have I never entered into any arrangements with any distributor which at-

(2695)

tempted to fix the maximum price of a subsequent run theatre but it would not be good business for me to do so.

"In connection with the licensing of films, there are certain other specific points which I emphasize.

"1. In licensing films for exhibition in Fox Wisconsin theatres, there is only one controlling consideration, namely, to secure adequate product on fair and appropriate terms.

"2. In negotiating for product with any one of the distributors which is also interested in theatres, Fox Wisconsin does not know and has not the slightest interest in whether or not Twentieth Century-Fox Film Corporation has or has not licensed its product to theatres in which such distributor is interested.

"No representative of Twentieth Century-Fox Film Corporation has ever indicated to me, directly or indirectly, that, in licensing film from other distribu-

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tors, any consideration whatsoever should be given by me to whether or not Twentieth Century-Fox Film Corporation has licensed pictures to the theatres operated by such distributor.

"This company is interested in licensing pictures solely because of their value as box-office attractions and then only when it can secure them on proper terms. For example, when it negotiates with Loew's

(2696)

for the exhibition of Loew's product in its theatres, it does not know whether Twentieth Century-Fox has entered into any license agreement with Loew's for the Loew's theatres, or any of them. It does not know whether it is even negotiating with Loew's. If Twentieth Century-Fox has made such film contracts, Fox Wisconsin does not know of it nor of the terms which are contained therein. Furthermore, if Twentieth Century-Fox was wholly unable to license its product to any Loew's theatre for any reason whatsoever, it would not have the slightest effect upon the desire of Fox Wisconsin to enter into license agreements with Loew's. The same applies to any other distributor. Moreover, no representative of Twentieth Century-Fox Film Corporation has ever requested that he be furnished with the terms upon which I licensed pictures from all distributors, nor have I ever furnished such information to any representative of Twentieth Century-Fox Film Corporation.

"My own personal interests all impel me to act for the sole welfare and benefit of Fox Wisconsin. I have no connection with Twentieth Century-Fox Film Corporation. I do have an employment contract with Fox Wisconsin. The terms of my contract provide for

(2697)

a certain fixed salary, with a participation in the

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profits of the company. I also am a stockholder in National Theatres Corporation. I am interested, therefore, from the financial standpoint, in promoting the best interests of my company. I am not concerned with the effect which the policies of my operation may have upon the distribution problems of Twentieth Century-Fox Film Corporation.

"My attention is also directed to the claim of the Government that, where two affiliated exhibitors are in competition with each other, such competition is purely nominal and not real. In so far as the situations in which Fox Wisconsin has such affiliated opposition, I unqualifiedly deny this claim. My company is in direct competition with theatres operated by Warners in a number of situations. In every respect, the degree of competition between us is as great as it possibly could be in all phases of the business.

"There certainly can be no doubt as to our competition for the patron's dollar. We each adopt every policy possible, consistent with good business, to secure patronage from each other.

"It is said by the Government that, over a period of time, the licensing of pictures in the theatres of affiliated exhibitors follows a certain pattern and that, season after season, the same product is licensed to the

(2698)

same theatres. I first point out that this is no phenomenon. There is nothing striking or unusual about it. There are certain practical aspects in the licensing of motion picture films which cannot be ignored. An exhibitor, in order to secure product away from another exhibitor, must be able to do two things, namely, provide adequate playing time on terms which will return more revenue to that distributor than he has been receiving and, at the same time, furnish ade-

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quate facilities for the exhibition and exploitation of the distributor's product. A desire on the part of an exhibitor to corral all product available when he cannot properly exhibit all of the product will not enable him to secure all of it from a competing exhibitor who has had a satisfactory performance record with the distributors with whom he has previously dealt.

"I can best illustrate the point to which I refer by relating it to a specific situation, such as first run in Milwaukee. At the present time, there are six theatres operating on a regular first run and move-over policy in that City. Fox Wisconsin has the Wisconsin theatre, with a seating capacity of 2,778, and the Palace theatre, with a seating capacity of 2,438, both of which are operated as first run theatres. It also has the Strand, with a seating capacity of 1,200, which is operated as a move-over house. Warner Bros. op-

(2699)

erates the Warner theatre, with a seating capacity of approximately 2,000 seats, and the Riverside theatre, with a seating capacity of 2,300 seats, as first run theatres. It also has the Alhambra theatre, with a seating capacity of about 1,400 seats, which is operated as a move-over house. The Wisconsin, Palace, Warner and Riverside are fine, luxurious theatres. The Wisconsin and Warner theatres, in particular, may be properly described as show case theatres in that they are the finest in the entire area between Minneapolis and Chicago.

"For many years, the product of Twentieth Century-Fox has been licensed to Fox Wisconsin for first run exhibition in its theatres. Obviously, this is only natural in view of the interest which Fox has in the operation. There has, likewise, been licensed for exhibition in these theatres the product distributed by

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Loew's, Paramount and Columbia. There has been licensed to the Warner Bros. theatres the product of Warner Bros. itself, together with the product of RKO, Universal and United Artists.*

(2700)

I submit that not only is there nothing unusual about such a situation but that it would be strange indeed if it were otherwise. It must be remembered that a theatre needs product as well as that a producer needs a satisfactory outlet for its pictures. As indicated above, the respective theatres of Fox Wisconsin and Warner Bros. would each provide adequate outlets for the films released by any one of the distributors. In the case of Fox Wisconsin, with the four products above named, and the products of certain independent producers, which it exhibits from time to time, it is able to operate its theatres on a policy which gives to the pictures which it licenses fair and appropriate playing time. By reason of this it is able to satisfy the revenue demands of the producers of the pictures which it exhibits. Under present conditions, moreover, where attractions have longer runs than has heretofore been the case, it has had an adequate supply of pictures for its theatres despite the fact that the programs of the various distributors have been curtailed during the war years.

"Now, under such conditions, Fox Wisconsin could not secure licenses for *all* of the pictures which are presently being licensed to the Warner Bros. theatres. From the standpoint of Fox Wisconsin, this would represent economic suicide. It could not, under any

(2701)

circumstances, afford to pay to the distributors now

*I have only referred to the distributors who are defendants. The product of other producers, depending upon its suitability for first run exhibition in these theatres, is also licensed by either Fox Wisconsin or Warners.

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licensing product to the Warner Bros. theatres more money than they are now receiving and, at the same time, continue to pay the distributors whose pictures it presently shows. From the standpoint of the distributors who are presently licensing pictures to the Warner theatres, they would know that, if they licensed their product to Fox Wisconsin, they would not receive adequate playing time because of the number of films which Fox Wisconsin would then have under contract. They would also know that, over a period of time (not matter what the initial guaranteed rental to them might be), they would secure no benefits.

"In other words, if, as at the present time, they are securing fair and reasonable revenue and proper exploitation of their pictures in the desirable outlets afforded by Warner Bros., they have no particular interest in jeopardizing their present playing position.

"It must be apparent that, in a competitive situation such as this, there comes what may be called as 'saturation point' beyond which no exhibitor can profitably or effectively go. It would be folly for Fox Wisconsin, being able to negotiate for adequate product for its theatres, arbitrarily to set out to induce a particular distributor, say, RKO, to discontinue satisfactory business relations with Warner Bros. and license its product to Fox Wisconsin. It

(2702)

would be folly for it to take on product which it did not require, for which it would have to pay an exorbitant amount and which would only serve to complicate its operating policies and involve it in problems with the distributors whose product it had been exhibiting. Likewise, from the standpoint of RKO, it would be bad business for it to discontinue business

Fitzgerald

dealings with Warner Bros., if that company is affording it a desirable market for its pictures and assume the obvious risks incident to such a change of customers.

"Thus, so long as these various distributors are able to arrive at satisfactory terms for the licensing of their pictures to their present accounts, there is no good business reason for them to change. If, on the other hand, a distributor arrives at a stalemate with an exhibitor, or reaches the conclusion that its product is not being satisfactorily exploited and it is not receiving adequate revenue, there is another customer to which it can turn. There is another available outlet for its product with whom it can negotiate. In such a situation, it then might be able, by reason of terms which it would offer, to supplant a distributor who was then licensing that outlet.

(2703) "In the case of individual pictures, however, a dif-

ferent situation exists. A recent example of this has occurred in the case of the picture 'Wonder Man', produced by Samuel Goldwyn. Prior to the release of this picture, the previous Goldwyn pictures had been licensed for exhibition first run in Milwaukee to Warner Bros. RKO, which distributes the Goldwyn pictures, and which also licenses its own product in the Warner theatres, could not arrange a deal with Warner Bros. on satisfactory terms. I was solicited by RKO and a proposal submitted to me for the licensing of this picture in Fox Wisconsin's theatres. Negotiations were concluded on terms satisfactory to me, the picture was licensed for exhibition in Fox Wisconsin's theatres and it is now being exhibited there.

*Fitzgerald***"V. THEATRE SITUATIONS IN COMMUNITIES IN WHICH FOX WISCONSIN OPERATES.**

"I now turn to a description of the competitive situation in the various cities and towns in which Fox Wisconsin operates.

"A. MILWAUKEE

"Pop. 1940 Census"	587,472
Pop. Present (Est).	600,000

"1. First run.

"An adequate description of the first run situation in Milwaukee has heretofore been set forth. Certain (2704)

it is that the theatres which do exhibit first run product are the finest theatres in the downtown section of Milwaukee. No exhibitor has claimed, to my knowledge, that he has available facilities to establish additional first run competition. The existing competition between Fox Wisconsin's theatres and Warner Bros. theatres is a very real one. The theatres which today operate on a first run policy would do so, and would be licensed by the distributors on that run, regardless of who owned them and whether or not that owner was affiliated with any distributor or not.

"With respect to the operation of these theatres, I am impelled to state that it is my definite opinion that Fox Wisconsin, because of its trained personnel, its experience in the exhibition business, its energetic and progressive showmanship, operates these theatres, as well as all of its theatres, in a manner which best serves the interests of the public as well as the interests of the distributors. It is my opinion that its operation is most efficient and is designed for the best exploitation of motion pictures.

"Furthermore, these first run theatres provide an adequate outlet for the pictures of all producers, in-

Fitzgerald

dependent and affiliated. There is no motion picture released, regardless of who produced it, which does not

(2795)

secure a first run in Milwaukee's downtown theatres, if it is of a quality and calibre which merits such an exhibition.

2. *First neighborhood runs.*

First neighborhood runs in Milwaukee are licensed to a number of theatres, each of which is more or less in the center of a separate competitive area. These may properly be called first runs in their respective zones. They generally take clearance over subsequent runs in such zones. They are as follows:

Seating Capacity			
Oriental—			
Approximately 2300—Operated by Warner Bros.			
Garfield—			
"	1800—	"	" Fox Wisconsin.
Uptown—			
"	1800—	"	" Fox Wisconsin.
Tower—			
"	1600—	"	" Warner Bros.
Avalon—			
"	1200—	"	" an independent.
Modjeska—			
"	2500—	"	" Fox Wisconsin.
Paradise—			
"	1240—	"	" Fox Wisconsin.*

*Two small communities adjacent to Milwaukee, namely, Cudahy and South Milwaukee, also have theatres which could play off the same availability as the first neighborhood runs referred to above. These are the Majestic theatre (seating capacity 750) in Cudahy and the Garden theatre (seating capacity 405) and the Grand theatre (seating capacity 400) in South Milwaukee. These theatres are operated by independents. The policy of these theatres, however, has been to operate on a later availability than the other first run neighborhood theatres.

Fitzgerald

"Substantially all of the product of the distributors is licensed in these theatres. Regardless of ownership, they are the theatres in which any distributor would prefer to have its product exhibited on this run. As indicative of this, the Oriental and Tower theatres have, over the period of the last ten years, been operated under several managements. During a substantial portion of the period the operation was in the hands of an independent. Yet there was no change in the run licensed to the theatres by the various distributors. During this period of independent operation there were, in the respective zones in which the Oriental and the Tower played first run, other subsequent run theatres operated by both Fox Wisconsin and Warner Bros. The fact of affiliated competition had nothing to do with the licensing of the product to the theatres.

(2706)

"3. *Subsequent runs.*

"There are 68 theatres operating on such runs. 40 of them are being operated by independents. 6 are operated by Warner Bros. 22 of them are operated by Fox Wisconsin. All compete with each other as well as with all other theatres in Milwaukee.

"B. RACINE

"Pop. 1940 Census

67,195

"Pop. Present (Est.)

73,195.

(2707)

"In this City Fox Wisconsin operates one theatre, the 'Uptown' (seating capacity 1392), which plays third run on all product which it licenses, except one, which it plays second run.

Fitzgerald

"Warner Bros. operate three theatres on a first and second run policy. They are the Venetian (seating capacity 1963), the Rialto (seating capacity 1279) and the Badger (seating capacity 1001). These first run theatres of Warner Bros. are fine, well located, downtown theatres. Although Fox Wisconsin naturally would desire to improve the run which it has at the Uptown theatre, the location and other factors do not make it as desirable a theatre from the distributors' standpoint as either the Venetian or the Rialto. Consequently, Fox Wisconsin has been unable to license product on any more favorable run. I am convinced that the same situation would prevail if the first run theatres were operated by interests wholly unaffiliated with any distributor.

"In addition to the affiliated theatres in Racine, there are five other theatres operated by independents and having a seating capacity of between 750 and 1,000.

"C. MADISON

"Pop. 1940 Census	67,447
Pop. Present (Est.)	72,000

" (2708)

"Fox Wisconsin is interested in the operation of four theatres in this City. Two of them the Orpheum (seating capacity 2244) as a first run theatre and capacity 1236) operate as first run theatres, playing pictures for one week. The product of Twentieth Century-Fox, Loew's, Columbia, United Artists, Universal, together with approximately one-half of the product distributed by Paramount and RKO, is exhibited on this run. Warner Bros. operate the Capitol (seating capacity 2246) and the Parkway (seating exhibit generally the product of Warner Bros., Mono-

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gram, Republic and approximately one-half of the product of Paramount and RKO.

"Fox Wisconsin also operates the Madison Theatre (seating capacity 908) on a move-over and second run policy and the Strand (seating capacity 1352) as a second run house. Warner Bros. operate the Majestic (seating capacity 537) as a second and third run house, with the product which plays in the Capitol theatre first run. There is also the Eastwood theatre operated by an independent which exhibits the product of all of the distributors on a third and fourth run.

"The Fox Wisconsin Orpheum theatre and the Warner Bros. Capitol theatre are two of the finest theatres in the State of Wisconsin. They are modern, commodious theatres and afford to the theatre-going

(2709)

public of Madison as fine service as is supplied by any theatres anywhere in the United States. The fact of affiliation has nothing to do with the licensing of product to these theatres. They most certainly would be the most sought after outlets for the production of the distributors, regardless of ownership.

D. KENOSHA

"Pop. 1940 Census	48,765
Pop. Present (Est.)	53,765

"Fox Wisconsin has one theatre in this City, the Orpheum (seating capacity 1405). This theatre operates on a second run policy, licensing the product from all distributors. The first run theatres take 60 days clearance over this theatre.

"Pictures are licensed for first run exhibition in Kenosha to two theatres operated by Standard Theatres Inc. (which I understand is associated with

Fitzgerald

Warner Bros. in this operation), the Kenosha (seating capacity 2,000) and the Gateway (seating capacity 1,442). Both of these theatres are modern, up to date houses, well located and well suited to a proper exploitation of the product of the distributors. Here, again, while Fox Wisconsin very naturally would desire to improve its playing position, the distributors

(2710)

have taken the position that in their opinion they can obtain better results by licensing the product to the two Warner Bros. theatres.

"In this connection I should point out that Fox Wisconsin, in the period between 1933 and 1941, had no theatre in Kenosha. The Orpheum Theatre, which it now has, was operated by Warner Bros. up to 1941, at which time the owners became dissatisfied with their arrangements and negotiated with me to acquire the theatre. Fox Wisconsin did so, directly entering into competition with Warner Bros.

"In addition to the theatres above referred to, there are four other theatres in Kenosha which operate on a subsequent run policy, three of them being operated by independents and one by Warner Bros.

"The foregoing represent all of the cities in Wisconsin which are in the Milwaukee Exchange territory having a population of 50,000 and more. In only 2 of these 4 cities does Fox Wisconsin have first run theatres and in those there are competing first runs.

"Fox Wisconsin also operates theatres in 4 cities in this same exchange territory which have populations of between 20,000 and 50,000. These are Fond du Lac, Oshkosh, Janesville and Wausau. In these

(2711)

Fitzgerald

4 cities Fox Wisconsin operates or is interested in, all of the first run theatres. There is independent subsequent run competition in two of such cities.

"In this same exchange territory there are 7 other cities with a population in excess of 20,000, in which Fox Wisconsin has no interest in theatre operations. These are Green Bay, Beloit, Appleton, Sheboygan, Manitowoc, Wauwatoss and Waukesha. In 5 of these 7 cities all of the theatres are operated by independents.

"Fox Wisconsin also operates theatres in 10 communities in the Milwaukee Exchange territory which have a population of less than 20,000. These are Beaver Dam, Marinette, Menasha, Port Washington and Stevens Point, in Wisconsin, and Hancock, Houghton, Iron Mountain, Laurium and Menominee, in Michigan. These communities vary in size from 3,500 to 15,000. In 3 of these communities there is only one theatre. They are Laurium, Menominee and Houghton, in Michigan. There never has been more than one and the size of the community is such that it could not support more than one. In 5 of them, namely, Hancock and Iron Mountain, Michigan, and Port Washington, Beaver Dam and Stevens Point, Wisconsin, there have never been more than 2 theatres and in 2 of these 5 communities which have 2 theatres

(2712)

only one is in operation, the other being antiquated and wholly unfit for use as a theatre. In the remaining town there is competition between Fox Wisconsin and two independent operators who compete with respect to all runs, as to the product of the defendants

1908

Fitzgerald

in this case, the Fox Wisconsin theatre generally licensing only Fox, Paramount, and one-half of Metro.

"Thus, while Fox Wisconsin has theatre interests in only 10 communities having a population of between 3,500 and 20,000, there are in the Milwaukee Exchange territory more than 50 other communities in this population range.

"Fox Wisconsin has not conspired or combined with, and has no agreement or understanding with, any other defendant in this case to restrain interstate trade or commerce or to monopolize or attempt to monopolize interstate trade or commerce in the distributor or exhibition of motion pictures. It has no agreement, express or implied, with any other defendant, relating in any way to the distribution or exhibition of motion pictures other than the express license agreements which it has made for the licensing of pictures in its theatres.

(2713)

"I also deny that Fox Wisconsin, either individually or in conjunction or combination with any other person, has engaged in any practice which is unfair or discriminatory with respect to any exhibitor with which it competes.

"(Sgd) Harold J. Fitzgerald."

Newman

(The affidavit of FRANK L. NEWMAN, SR. is as follows:)

"IT IS HEREBY STIPULATED by and between counsel for the plaintiff herein and counsel for the defendants, Twentieth Century-Fox Film Corporation and National Theatres Corporation, that if called as a witness in this action, FRANK L. NEWMAN, SR. would testify as follows:

"I reside in Seattle, Washington, where I have lived continuously since 1932. I am now, and have been since 1907, actively engaged in the theatre exhibition business. I have operated theatres in St. Louis, Joplin, Kansas City, St. Joseph and Moberly, Missouri; Milwaukee, Wisconsin; Ft. Smith and Little Rock, Arkansas, and Los Angeles, California. Since 1932, I have been operating theatres in the States of Washington and Oregon.

(2714)

"In 1923 I became and am now President of Evergreen State Amusement Corporation, hereinafter called 'Evergreen', a Delaware corporation, organized on February 6, 1933, having its principal office in Seattle, Washington. I have been a director since 1936 and President since 1941 of Fox-Pacific Theatres, Inc., hereinafter called 'Pacific', a Washington corporation, organized on April 2, 1929, having its principal office in Seattle, Washington.

"53.58% of the capital stock of Evergreen is owned by the defendant, National Theatres Corporation; 40% is owned by a corporation in which Mr. Al Rosenberg, Mr. Al Finke and I have an interest; 2.4% is owned outright by Mr. Rosenberg, Mr. Finke and myself and the balance is held by the general public.

Newman

"The capital stock of Pacific is owned 60% by National Theatres Corporation and 40% by De Luxe Theatres, Inc., a corporation in which Mr. Al Rosenberg and Mr. Al Finke have an interest. I have no interest in De Luxe Theatres, Inc.

"Both Mr. Rosenberg and Mr. Finke have been associated in an official capacity with Evergreen and Pacific since their respective incorporations.

"Evergreen operates, directly or indirectly, through its subsidiaries, 28 theatres in ten cities and towns in

(2715)

Washington and 11 in two cities in Oregon. Of this total of 39 theatres, Evergreen and its subsidiaries lease 33, own two in fee and have an interest in the four others through operating agreements with other exhibitors. One of its theatres is closed and has been closed for several years because of its bad physical condition. In addition to theatre properties, Evergreen leases office space in Seattle, has some warehouse facilities in Seattle and owns the fee of unimproved real property in Spokane and Vancouver, Washington.

"Evergreen owns stock in 19 subsidiaries. Fourteen are wholly owned and, in the remaining five, Evergreen owns 50% or more of the capital stock. All but three have an interest in theatre properties. Two of these three are inactive. The other is known as a service company and has no interest in any theatre property. Evergreen's exhibition business was organized so that its several theatre interests would be held by several separate corporate entities for the purpose of distributing the risk of liability, the risk of sectional business failure and for the purpose of availing itself of the tax advantages possible in a business structure with several distinct taxable organizations.

Newman

"Pacific leases and operates two theatres in Seattle and owns 50% of the stock of a corporation which
(2716)

leases and operates three theatres in Everett, Washington, and which leases a former theatre property in Everett which has long since been commercialized.

"Of the 44 theatres in Washington and Oregon in which the defendant, National Theatres Corporation, derives an interest through Evergreen and Pacific, National Theatres Corporation has a net financial interest of less than 50% in 28 and a net financial interest of more than 50% in 16.

"I am generally familiar with the allegations made by the plaintiff in its petition and with the evidence on which it relies and am aware of their bearing upon Evergreen's theatre business.

"HISTORICAL DEVELOPMENT OF EVERGREEN THEATRES

"A major part of the 44 theatres in which Evergreen or Pacific now have an interest were once part of a more widespread circuit developed gradually over a long period of years prior to 1926 by two men and their organization, C. S. Jensen and J. G. von Herberg.

"In 1926, Jensen and von Herberg had an interest in 33 theatres located in Astoria and Portland, Oregon; Butte and Great Falls, Montana; and in Bremerton, Olympia, Seattle, Sunnyside, Tacoma, Wenatchee

(2717)

and Yakima, Washington. During the period of their operation of this circuit, Jensen and von Herberg exhibited most of the product which they licensed on prior showings with substantial clearance over subsequent exhibitions.

"The theatres of Jensen and von Herberg were among the best in those communities in which they were located. In Seattle, the Coliseum, Liberty and Strand theatres and the Rex and Rialto in Bremerton were all operated first run by Jensen and von Herberg. These theatres were and still are, with the exception of the Strand, which has been dismantled and is no longer in existence, superior downtown theatres. At the present time, the Liberty and the Rialto are still operated as first run theatres and the Coliseum and the Rex are operated as second run theatres. Evergreen now has an interest in the Rialto, Rex and Coliseum.

"In August of 1926, after extensive negotiations with an individual named Frank E. Elson, Jensen and von Herberg sold all of their theatres in a group to North American Theatres, Inc., a Delaware corporation, hereinafter called 'North American', for a purchase price of approximately \$1,500,000. The theatres thus acquired by North American were operated by it during the ensuing year in addition to nine others which were acquired at different intervals during that year. In the spring of 1927, North

2718)

American had an interest in a total of 41 theatres.

"In 1927, negotiations commenced between Wesco Corporation, hereinafter called 'Wesco', and North American for the purchase of the latter's theatre interests. Pursuant to a written offer dated May 7, 1927 made to and accepted by Wesco, a sale was consummated on June 3, 1927. As a result of this transaction, Wesco acquired an interest in 41 theatres in 12 cities located in the States of Montana, Oregon and Washington.

Newman

"These theatres, with the exception of changes in theatres dropped or theatres added, were operated by a subsidiary of Wescó called Pacific Northwest Theatres, Inc., hereinafter called 'Northwest', and associated corporations from the time of their acquisition to the bankruptcy of Northwest.

"The years from 1924 to 1933 represented a period of great activity and change in the theatre business in the Northwest. Many of the theatres which are today the finest in their respective localities were constructed in those years. Several of the film companies entered the area for the first time and competed vigorously with each other for the acquisition of the best outlets for their respective product. Paramount built and opened theatres in Portland and Seattle. The Keith-Albee-Orpheum circuit acquired an interest

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in theatres in Portland and Spokane and built a new one in Seattle. Universal Pictures, Inc. became interested in many theatres throughout Washington and Oregon between the years 1924 and 1928. In 1928 in Seattle, for example, Universal was operating or had an interest in ten theatres. Local independent exhibitors intensified their activities. John Hamrick opened a new theatre in Seattle, the Music Box, in 1928, which he thereafter operated with first run product along with his Blue Mouse, which he had previously built and opened about 1920. John Danz greatly expanded his theatre holdings and, by 1930, had 17 theatres in Seattle.

"All of the intense and accelerated theatre activity in this period reached a climax at the time of the depression and its accompanying financial distress. None of the theatre interests acquired any of the film distributing companies in the last half of the

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'20s were retained after their respective bankruptcies in the early '30s except those of Fox Film Corporation.

"In 1932, after I had become associated with Northwest and just prior to its bankruptcy, Northwest was operating or had an interest in subsidiaries operating 50 theatres. It was sustaining an average weekly loss of \$30,000. It then became apparent that the competition between exhibitors, affiliated and otherwise, for the theatre outlets had resulted in

(2720)

investments and in lease requirements wholly out of proportion to what could be carried during times of business decline. In spite of efforts to bring about rental reductions to decrease operating costs, Northwest, in the latter part of 1932, found itself in an impossible position and, on its voluntary petition, was adjudicated a bankrupt on December 31, 1932, in the United States District Court for the Western District of Washington, Northern Division.

"In the reorganization that ensued and which resulted in the creation of Evergreen, I and my associates, Mr. Rosenberg and Mr. Finke, made substantial capital investments in order to make the reorganization possible. For this investment we received 40% of Evergreen's stock.

"Evergreen now has an interest in 24 theatres, which were previously operated by Northwest or its subsidiaries, and most of the 24 were originally a part of the Jensen and von Herberg theatre interests.

"Of the other 26 theatres in which Northwest had an interest prior to its bankruptcies but in which Evergreen does not now have an interest, 13 have been taken over and are operated today by unaffiliated exhibitors.

(2721) "Four of the former Northwest theatres in which

Evergreen has no interest are no longer in existence.

"Most of the remaining nine former Northwest theatres in which Evergreen has no interest are located in the State of Montana and are, on information and belief, theatres in which Fox West Coast Theatres Corporation now has an interest.

**"THE ORGANIZATION OF EVERGREEN AND ITS
PRESENT METHOD OF OPERATION.**

"I have heretofore described the extent of the stock interest of National Theatres Corporation in Evergreen and Pacific. Evergreen and Pacific, however, are operated as separate, autonomous business entities. The directors of Evergreen are, besides myself, Messrs. Al Rosenberg, Al Finke, C. R. Innis, A. M. Ahlskog, A. Shemanski, C. H. Howell and C. P. Skouras, none of whom, except C. P. Skouras, is associated with National in any official capacity. The directors of Pacific, besides myself, are Messrs. Al Rosenberg, Al Finke, C. R. Innis and C. P. Skouras. The executives and directors of National Theatres Corporation do not participate in the management or operation of the theatres of these two companies which are directly under the supervision and control of myself and Mr. Rosenberg and Mr. Finke, as are

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the general policies of the operation. The executives of National Theatres Corporation, by reason of that company's financial interest in Evergreen, naturally pass judgment upon and exercise a certain amount of direction on all important financial transactions, such as new theatre building acquisitions, renovations or other large capital commitments. Be

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yond this, however, they in nowise interfere or regulate the management of the company and I and my associates have complete authority and discretion with respect thereto. This applies with respect to the making of all contracts and other commitments relating to the operation of the theatres, including film license agreements. The assent or approval of National Theatres Corporation with respect to these is not required nor solicited, either before or after the making thereof.

"As previously indicated, I and my associates have a substantial personal interest in the stock of Evergreen which represents an actual cash investment in the business. When we undertook to make this investment and to take over the management of the operation, we insisted upon the greatest latitude in the formulation and execution of business policies. This control and responsibility was given to us and we have exercised it ever since, unhampered by any outside dictation.

(2723) "Evergreen has a wholly owned subsidiary, Ever-

green Theatres Corporation, which is a service corporation for all of the theatres in which Evergreen and Pacific are interested. It performs all of the activities incident to the actual operation of the theatres, including the licensing and booking of films, accounting, maintenance of the theatres, planning and arranging for advertising, purchasing supplies, procuring and maintaining of insurance, and other similar functions. It maintains offices in Seattle and Portland.

"Its organization is divided into various departments. One department is known as the 'Film Buying Department.' It consists of a head film buyer and a number of assistants. (Mr. Frank X. Christie, who

is the head film buyer, has been associated with Evergreen since 1933, except for a period of time in which he was in the military service.) The general function of this department is to negotiate licenses for the pictures to be exhibited in the theatres and to arrange for their booking (playing dates) after the films have been licensed. The personnel comprising this department is highly skilled and trained in this work. Those who negotiate for the licensing of pictures must see all pictures which are produced. They must have special ability to judge the quality of such pictures. They must have a knowledge of the theatres operated by the company and the communities in which they

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are located. They must have an accurate evaluation of the tastes of the theatre-going public to which each theatre caters. In other words, to carry on their functions effectively they must know the box-office quality of each picture produced, gauging it in the light of the tastes of the public which patronizes each theatre.

"A. Business Practices Relating to the Licensing of Films.

"In so far as concluding contracts for the exhibition of motion pictures is concerned, Evergreen operates entirely independently. It makes film contracts for theatres in which it is interested and only those theatres.

"The general practice in the licensing of films is that as to each producing company, its local representative in its Seattle or Portland Exchange (as the case may be), together with the district manager, in some cases, as well as the division manager, in others, will sit down with the buyers of Evergreen and negotiate with respect to the pictures which the producer

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then has available for licensing. In the case of the companies which are parties to the Consent Decree, these negotiations occur with respect to each block of pictures offered by each such company. As to other producers, the negotiations generally relate to the entire season's product.

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"Prior to the entry of the Consent Decree all distributors licensed their entire season's product at one time. National Theatres Corporation then maintained a central office in New York where negotiations were generally conducted with all of the distributors for the licensing of pictures in all of the theatres in which National was interested. Even under this procedure, however, the licenses were made with respect to each individual theatre and each license agreement had to be approved by myself and my associates. In the latter part of 1941 there was a complete decentralization of the so-called Buying Department of National Theatres Corporation, and, as stated above, the licensing of film with the companies which are parties to the Consent Decree is done locally, that is—as far as Evergreen is concerned—in Seattle or Portland.

"In certain instances a distributor who is a party to the decree may negotiate license agreements with another subsidiary of National Theatres Corporation before it conducts any negotiations with Evergreen. For example, a distributor might negotiate with Fox West Coast in Los Angeles with respect to theatres operated in Southern California. In the course of those negotiations a general formula might be agreed upon for a particular group of pictures for exhibition in the theatres of Fox West Coast. This formula

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might provide for a film rental based upon certain

percentages applicable to each picture, which percentages would apply to those particular theatres which played the pictures on a percentage basis rather than on a flat rental basis. Later, when the negotiations with that distributor are conducted in Seattle, the general formula previously agreed upon for the Fox West Coast theatres might be adopted by Evergreen, or might be used as a general basis for negotiation. Such prior arrangements which the distributor had effected with any of the other subsidiaries of National Theatres Corporation would, however, represent no binding commitment as far as Evergreen was concerned.

"Furthermore, as between Evergreen and the other operating subsidiaries of National Theatres Corporation, there is, of course, full exchange of information between the executives of the respective companies. This information relates to all matters which would be of mutual interest to the executives of these companies, including the terms upon which films have been licensed, the box-office value of particular pictures in particular territories, developments in theatre maintenance and operations generally. As to film terms, National has one employee whose general function it is to maintain contact with its subsidiaries, secure information from them and acquaint them with such facts as might be helpful in their own negotiations.

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"When the representatives of the distributors and the representatives of Evergreen have arrived at a satisfactory agreement, the proposed contract is then submitted to me for my approval. No license agreement for films can be concluded without specific delegation of authority from me or without my express

approval. In the negotiation of these licenses separate consideration is, in practically all instances, given to each particular theatre in the operations of which Evergreen is interested and a separate and specific deal made on the basis of each individual theatre.

"Evergreen enters into film license agreements with all distributors of worthwhile pictures, including a number who are not defendants in this case, such as Republic, Monogram, PRC and others. The general practice and procedures outlined above apply with respect to all negotiations.

"As to the terms upon which the pictures are licensed, there is no standard formula for every theatre, nor is there any standard formula applicable to each theatre. As to certain of the theatres of Evergreen, all of the license agreements for those theatres provide for film rental of a certain fixed flat amount. However, these flat rental deals vary with respect to each company whose product is licensed, depending upon the quality of the product. For certain pictures

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one of such theatres might pay \$100 flat rental while for another picture it might pay \$20. In a number of other theatres the license agreements provide for film rental determined in one way or another by a percentage of the gross business done by the theatre. Here, again, however, there is no standard formula or arrangement which is applied to these so-called 'percentage deals.' They vary greatly in form and substance as to the particular distributors involved. With one distributor the film rental might be predicated solely upon a specified percentage of the gross receipts. As to another distributor the license agreement might provide for what is called a 'sliding scale' arrangement, under which the percentage of the gross

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receipts to which the distributor is entitled would vary, depending upon the volume of business done by the theatre on the particular picture. Other formulae are also used. This all depends upon the particular negotiations with the particular distributor.

"All of these arrangements simply represent a measuring rod for the determination of the film rental which is to be paid. They are negotiated solely with an eye to arriving at a fair deal for both the distributor and the exhibitor. The various refinements which oftentimes are linked with a straight percentage deal are used only for the purpose of enabling the
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distributor to receive a higher percentage of the gross on pictures which are outstanding box-office attractions and to reduce his percentage upon productions which have less drawing power than anticipated at the time when the license agreement was made.

"At the time when negotiations are had for the licensing of the pictures and the terms upon which they are to be licensed are under consideration, the matter of clearance is also considered. This element of any licensing arrangement is of vital importance to the distributor. It also very directly affects the exhibitor: If Evergreen undertakes to pay a distributor a high guaranteed film rental plus a percentage of the gross receipts for a film license and proposes to charge a high admission price, it is certainly interested in the clearance which it will have on that picture over the subsequent run thereof which the distributor might license to a competitive theatre. Clearance obviously has a definite effect upon the capacity of Evergreen to secure patronage at its top admission price and be able to pay to the distributor a film rental commensurate with the granting by such distributor of the first run license.

Newman

"Generally speaking, the actual negotiations as to clearance do not take place with respect to each block of pictures which is licensed. This is because of the

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fact that once a fair and reasonable clearance has been determined upon by the distributor and exhibitor, it tends to become fixed and, in the absence of any changed circumstances or conditions, will ordinarily be the same in a series of contracts.

"Of course, the practice of granting clearance is not confined to communities where Evergreen is operating theatres or to Evergreen theatres themselves, and in many places where Evergreen has prior run theatres, they are operated in competition with the theatres of independent exhibitors having an identical run. For example, in Bremerton, Washington, the Roxy theatre exhibits first run the product of Columbia, RKO, Universal and Republic, and as to that product is granted generally the same number of days clearance over second run which the Evergreen theatres have on their product. The same is true of the Grand theatre in Bellingham, Washington, which is operated by an independent with the first run product of Columbia, Universal and Republic and one-half of Warner's.

"One of the outstanding facts which has characterized the development of clearance in communities throughout the Northwest has been the steady reduction in the number of days clearance granted to one theatre over another. In the last 15 years the first run clearance in Seattle, Washington, generally has been reduced by most distributors from 60 to 42 days, and

(2731)

furthermore, clearance is now computed in Seattle from a date not later than the fourteenth day of first

run exhibition, so that the availability of subsequent run theatres cannot be affected by first runs extending beyond two weeks. In Spokane, Washington, first run clearance has been reduced from 5 months to 50 days. In Bellingham, Bremerton, Olympia, Wenatchee and Everett, Washington, clearance granted to the first run theatres has been reduced from 5 months to 90 days. The figures on the foregoing number of days are averages.

"My attention has been directed to the claim of the Government that the distributor and the affiliated theatres agree upon clearance and minimum admission prices for the purpose of fixing the actual price which a subsequent run exhibitor may charge, and that such factors are agreed upon for the purpose of improperly subordinating the freedom of action of such subsequent run exhibitor. This I flatly deny. In instances where my company is operating a prior run theatre, I have no concern of any sort as to the maximum price which my subsequent run competitor charges. It is my desire that he charge a price which is as close to the price which I charge in the prior run as he considers feasible. Generally speaking, if my theatre operates first run and charges 60¢, the subsequent run

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exhibitor who plays 28 days after my first run theatre and charges 50¢ is less competitive than a subsequent run which plays on the same availability but charges only 30¢.

"Consequently, not only have I never entered into any arrangements with any distributor which attempted to fix the maximum price of a subsequent run theatre but I would be ill advised to endeavor to do so.

Newman

"In connection with the licensing of films, there are certain other specific points which I emphasize.

"1. In licensing films for exhibition in Evergreen theatres, there is only one controlling consideration, namely, to secure adequate product on fair and appropriate terms.

"2. Evergreen licenses films for the theatres in the operations of which it is interested—and only those theatres. The licenses for pictures are negotiated locally in either Seattle or Portland and no outside person or corporation has any authority to commit it to any license agreement. I and my associates have complete authority to negotiate the terms or to refuse to make any agreement with any distributor, regardless of whether or not it has concluded arrangements with some other subsidiary of National Theatres Corporation.

(2733) "3. In negotiating license agreements, Evergreen does not condition the licensing of the pictures in some of its theatres upon the making of a deal with the distributor for all of its theatres.

"4. In negotiating for product with any one of the distributors which is also interested in theatres, Evergreen does not know and has not the slightest interest in whether or not Twentieth Century-Fox Film Corporation has or has not licensed its product to theatres in which such distributor is interested.

"No representative of Twentieth Century-Fox Film Corporation has ever indicated to me, directly or indirectly, that in licensing film from other distributors any consideration whatsoever should be given by me to whether or not Twentieth Century-Fox Film Cor-

Neuman

poration has licensed pictures to the theatres operated by such distributor.

"Evergreen is interested in licensing pictures solely because of their value as box-office attractions and then only when it can secure them on proper terms. When it negotiates with Loew's for the exhibition of Loew's product in its theatres it does not know whether Twentieth Century-Fox has entered into any license agreement with Loew's for the Loew's theatres, or any of them. It does not know whether Fox is even negotiating with Loew's. If Twentieth Century-Fox has made such film contracts, Evergreen does not know of it nor of the terms which are contained therein. Furthermore, if Twentieth Century-Fox was

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wholly unable to license its product to any Loew's theatre for any reason whatsoever, it would not have the slightest effect upon the desire of Evergreen to enter into license agreements with Loew's. The same applies to any other distributor. Moreover, no representative of Twentieth Century-Fox Film Corporation has ever requested that he be furnished with the terms upon which I licensed pictures from all distributors, nor have I ever furnished such information to any representative of Twentieth Century-Fox Film Corporation.

"My own personal interests all impel me to act for the sole welfare and benefit of Evergreen. I am not a stockholder of Twentieth Century-Fox Film Corporation and have no connection with that company. I am not concerned with the effect which the policies of my operation may have upon the distribution problems of Twentieth Century-Fox Film Corporation. Moreover, with respect to the runs which are licensed

to Evergreen, and particularly the first runs, I am able to negotiate them because of the character of the theatres involved and their capacity to pay proper revenue to the distributors. Evergreen's first run theatres are licensed on that run because of their superior construction, location, conveniences, seating capacity and other factors which make them superior theatres and which give to them superior public ap-

(2735)

peal. They do not secure such licenses because of any relationship with Twentieth Century-Fox Film Corporation or National Theatres Corporation.

"Furthermore, as to theatres in existence before Evergreen acquired an interest in them, they were operated as first run theatres throughout their entire existence, regardless of ownership.

**"EVERGREEN'S THEATRES AND COMPETITIVE SITUATION
IN EACH COMMUNITY WHERE THEY ARE LOCATED."**

"Evergreen operates theatres in the following towns and cities in the State of Washington, showing the population of each for 1920, 1930 and 1940. The 1945 population is an estimate of the Census Board of the State of Washington.

	1920	1930	1940	1945
Seattle	315,312	365,518	368,302	470,000
Spokane	104,437	116,010	122,001	144,000
Bellingham	25,585	30,823	29,314	31,750
Bremerton	8,918	10,170	15,134	72,000
Aberdeen	15,337	21,723	18,846	19,500
Everett	27,000	30,567	30,224	35,000
Hoquiam	10,558	12,766	10,835	11,500
Olympia		11,733	13,254	15,500
Vancouver	12,637	15,766	18,788	39,500
Wenatchee	6,324	11,627	11,620	13,000

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"Evergreen also operates theatres in Portland and Eugene, Oregon, whose population for the years 1920, 1930, 1940 and 1944 (Estimate of the Chamber of Commerce in each city) is as follows:

(2736)

	1920	1930	1940	1944
Portland	258,288	301,815	305,394	415,000
Eugene	10,593	18,901	20,838	26,200

"The Evergreen theatres in Seattle, Spokane and Bremerton, Washington, and in Portland, Oregon, cities of over 50,000 population, will hereinafter be discussed in more detail.

Seattle, Washington

"Seattle now has a total of forty-nine theatres. Evergreen or Pacific has an interest in eleven. An independent exhibitor named John Danz has an interest in twenty. He is interested with Evergreen in the operation of four theatres in Seattle, three of which generally operate on a first run or moveover policy and the other one second run. Four of Seattle's theatres are operated by Jensen and von Herberg. The others are operated by unaffiliated exhibitors. No distributor other than Fox has any interest at the present time in any theatre in Seattle, Washington.

The theatres in which Evergreen and Pacific have an interest are the Fifth Avenue, Paramount, Orpheum, Music Hall, Blue Mouse, Music Box, Palomar, Roosevelt, Coliseum, Egyptian and Neptune. The Fifth Avenue, Paramount, Orpheum, Music Hall and Palomar are first run theatres. The Blue Mouse, Music Box and Roosevelt are moveover theatres. The Coliseum is a second run theatre and the Egyptian

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and Neptune third run.

"The Fifth Avenue (seating capacity 2,366) is one of the outstanding theatres in Seattle. It was built in 1926 and was opened on September 22, 1926, by North American Theatres, Inc., the corporation from which Wesco first acquired an interest in theatres in Seattle. The Fifth Avenue opened as a first run theatre and has always been operated as such.

"The Paramount theatre is the largest theatre in Seattle, having 3,049 seats, and was assessed in 1945, including land, building and equipment, for \$278,060. (Under Washington law, the maximum assessed value is one-half the market value.) It was built in 1928 for the Paramount Company as the first run outlet for its product. Pacific Northwest Theatres, Inc. acquired a joint interest in this theatre in 1930, and Paramount ceased to have an interest in the theatre after 1933. It has always been operated as a first run theatre.

"The Orpheum theatre has 2,599 seats, was built in the year 1929, at which time it was an RKO theatre operated on a first run and stage show policy. RKO ceased to have any interest in the theatre after 1933, and in 1934 it was operated by an independent exhibitor. Evergreen acquired its interest in 1935. The theatre always played first run product, irrespective of ownership, as long as it has been a motion picture

(2738)

theatre. Its 1945 assessed value for land, building and equipment is \$299,710.

"Evergreen acquired its interest in the Music Hall in 1935. It has 2,282 seats and in 1945 was assessed for \$152,160. The theatre was built in approximately the year 1927 by an independent exhibitor and was

operated on a first run policy. Pacific Northwest Theatres, Inc. had an interest in this theatre between 1930 and 1933, and operated it under the name of Fox. Between 1933 and 1935, it was operated by an independent exhibitor, and in 1935 Evergreen acquired its interest. It has never been other than a first run theatre or first run moveover.

"The Blue Mouse (851 seats) was built in 1920 by an independent exhibitor and ever since its opening has been a first run theatre or first run moveover. Evergreen first acquired an interest in it in 1935. It was remodeled in 1939 at a cost of \$13,071 and has a 1945 assessed value, including land, building and equipment, of \$103,730.

"The Roosevelt was built in the year 1933. It has an assessed value of \$78,950, seats 736 and is operated as a moveover theatre.

"The Palomar was built around 1915, has 1,437 seats and was assessed in 1945 at \$104,000. During

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the earliest years of its operation, it played vaudeville primarily under the management of Alexander Pantages. During recent years, from about 1938, it has played first run product along with stage shows.

"All of the theatres which have been described in some detail above are centrally located in the downtown district of Seattle in the main theatre section.

"There is one other theatre in Seattle which plays first run pictures, the Liberty with 1,650 seats. Another, the Newsreel, plays first run newsreels and short product. Both are located in the downtown section and Evergreen has no interest whatsoever in either. The Liberty is located in an inferior part of downtown Seattle, four or five blocks away from the

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main theatre district. It was one of the theatres acquired by Wesco in 1927 from North American, but by 1930 Wesco or its operating subsidiary had ceased to have any interest in the Liberty, and since that time it has been operated by the present exhibitors, Jensen and von Herberg.

"Ever since Jensen and Von Herberg resumed operation in 1930, the Liberty has had the first run product of Columbia and one-half of United Artists and in addition has exhibited the product of several of the independent producers. The Liberty charges the same admission price charged at the Evergreen first run

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theatres and has the same clearance over second run except that the Liberty clearance over second run commences with the close of the first run exhibition in the Liberty theatre no matter how long the Liberty's first run exhibition extends, whereas the clearance granted to Evergreen theatres dates from the fourteenth day of exhibition or the close, whichever is earlier.

"The subsequent run theatres in which Evergreen or Pacific has an interest are the Coliseum, Egyptian and Neptune. An interest in the Coliseum (1,957 seats) was acquired first by Pacific Northwest Theatres, Inc. in 1927 with the various other theatres acquired from North American Theatres, Inc. It was at that time and had always previously been a first run theatre. Evergreen obtained a lease in 1933 after direct negotiations with the landlord, and has since operated it as a second run theatre. The Coliseum was constructed in 1916, was reequipped in the years 1941 and 1942 at a total cost of \$16,773.40, and has now a total assessed value of \$283,150.

"The Neptune (968 seats) and Egyptian (1,263 seats) are operated as third run theatres. Both the-

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atres are fine, neighborhood houses located about four miles from the downtown district in a residential section and business center in the University of Washington district. There are thirty-four other subsequent

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run theatres, all operated in competition with an of the Evergreen theatres. A large number of them are operated by John Danz who has more theatres in Seattle than any other exhibitor.

"Prior to 1934-1945, first run theatres in Seattle generally had a clearance of 60 days after first run closing over second run. Since that time, clearance has been steadily reduced, and at the present first run Seattle theatres generally have 42 days over second run exhibition; 63 days over third run; 80 days over fourth run. The number of days clearance over theatres playing subsequent to fourth run varies with the distributors. All clearance is computed from not later than the fourteenth day of first run exhibition, except in the case of the Liberty theatre.

"Spokane, Washington

"Spokane now has a total of 14 theatres, all of which are located in the downtown area except two. One of the two neighborhood theatres is the Garland which has been recently constructed by an unaffiliated exhibitor and is scheduled to open some time in November, 1945.

"Out of this total of 14 theatres, Evergreen has an interest in four, the Fox, Orpheum, State and the Liberty, all of which are located in the downtown business center. The first three are operated with first run

(2742)

product, the Liberty with second run.

Newman

"The Fox is by all standards of comparison the best and largest theatre in the city. It has 2,251 seats and in 1945 was assessed, including the land, building and equipment, for \$213,400, which is \$100,000 more than any other theatre in Spokane. The Fox was built in 1931 on land owned by Fox West Coast Theatres Corporation and is still owned by one of the subsidiaries of that corporation, from which the theatre is leased by one of Evergreen's subsidiaries. The Fox has always shown the best in first run-product.

"The Orpheum has 1,272 seats and was constructed in 1918. In 1945 its total assessed value was \$98,385. Up until about 1928 or 1929 it was operated by Alexander Pantages, primarily on a vaudeville policy. In 1929, an interest in the theatre was acquired by RKO and for about four years thereafter was operated by RKO with vaudeville and first run product. In 1933, upon cancellation of RKO's lease, a subsidiary of Evergreen negotiated a new lease with the owner and ever since the theatre has been operated with first run product.

The State theatre has fewer seats, 954, than Fox or the Orpheum. It is, nonetheless, larger in seating capacity than any theatre in Spokane operated by an unaffiliated exhibitor. The State was constructed in

(2743)

1916 and in the current year has an assessed value of \$79,470. In its early history, the State was operated under the name of Clemmer, by an unaffiliated exhibitor, H. S. Clemmer, for many years one of the outstanding exhibitors in the business in the northwest. Universal had an interest in the State between the years 1928 and 1932, but the theatre was operated by Universal for a brief time only. During most of the time, the theatre was leased by Universal to and op-

erated by an unaffiliated exhibitor. Pacific Northwest Theatres, Inc. acquired an interest in the theatre in 1932 on a sublease from Universal. After the bankruptcy of Pacific Northwest Theatres, Inc., Evergreen negotiated a new and distinct lease with the owner of the State. The State, irrespective of ownership, has never played anything but first run product.

"An interest was not acquired in the Liberty theatre in Spokane by any Fox company until 1935. Prior to that time, it had a continuous policy of exhibiting first or second run pictures and had always been operated by independent exhibitors. Evergreen's interest arises out of an agreement dated March 31, 1935, between one of its wholly owned subsidiaries, Spokane Amusement Company, and Principal Theatre Company of Washington, a Washington corporation, in which Mr. Al Rosenberg and Mr. Al Finke and their associates are principal stockholders. As

(2744)

a result of this agreement, Spokane Amusement Company acquired a 50% interest in the Liberty and Principal Theatre Company of Washington acquired a 50% interest in Evergreen's Orpheum. Mr. Rosenberg and Mr. Finke have been associated with Evergreen since its organization, and it was only natural for their separate theatre interests in this city to have become associated with those of Evergreen.

"Spokane has always had, since 1926, not less than 13 theatres, and for most of the time three have played first run product. At the present time, in addition to the three Evergreen first run theatres, there is the Granada, which is operated by an unaffiliated exhibitor. The Granada, prior to 1934, was using first run product of Monogram, the second run of Universal and a third run of Warner Bros., United Artists

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and RKO. From 1934-1942, it licensed for most of the time, the second run product of Warner Bros., RKO, United Artists and Universal. In 1942, the Granada became a first run theatre, having acquired first run product of Universal and part of Republic and of Columbia. The theatre itself is a relatively small one, having but 550 seats, as compared with the usual size of first run house. In 1945, the assessed value of its equipment was \$2,000 as compared with \$10,000 for that of the Fox and \$3,100 for that of the State. The Granada charges the same admission price

(2745)

charged at the first run theatres operated by Evergreen, 70¢ gross. The Granada was built in 1912 and is older by a least two or three years than any of the Evergreen theatres.

"After the Granada became a first run theatre, the RKO product which it had been licensing second run was sold to the Post Street Theatres, which also plays vaudeville and repeat pictures and which is operated by an unaffiliated exhibitor. All of the third, fourth and fifth run product in Spokane is licensed in the atres of unaffiliated exhibitors.

"The clearance intervals generally applicable in Spokane are much less today than they ever have been. Prior to 1932, the first run theatres had a clearance of 150 days over any subsequent exhibition. This has been reduced from time to time to its present status of, generally, 50 days over second run exhibition.

"BREMERTON, WASHINGTON.

"Evergreen has an interest in four Bremerton theatres, the Admiral, Rialto, Rex and Bay. The first three are downtown theatres. The Bay, a suburban theatre, is located in the business center sometimes

Newman

called East Bremerton or Manette. The Admiral and Rialto are operated with first run product, the Rex (2746)

and the Bay with second and fourth run. There are three other theatres in Bremerton, all of which are operated by unaffiliated exhibitors in competition with Evergreen. These are the Roxy (first run), the Tower (third and second run) and the Grand (third and fourth run).

"The Admiral, the Roxy and the Bay are all new theatres, having been constructed since 1940. Bremerton during the last five years experienced an extraordinary growth in population from 15,134 in 1940 to an estimated 72,000 in 1945. The new theatres have been built in response to the greatly enlarged demand for motion picture entertainment.

"The Admiral, which is an Evergreen theatre, has more than twice the assessed value of the theatre having the next highest assessed value. In 1945, it was assessed at \$74,800. The next highest, the Roxy, was assessed at \$32,100. The equipment in the Admiral alone is assessed at \$15,000, whereas that of the Roxy is assessed for \$5,500. The Admiral was constructed in 1942 and has 1,324 seats and is modern and luxurious in all its equipment and furnishings.

"The Rialto was built in 1917 and seats 777. Both the Rialto and the Rex (331 seats) were theatres originally acquired by Wesco from North American Theatres, Inc. in 1927 along with the Bluebird in Bremerton which closed in 1928, dismantled and no longer (2747)

exists. Both the Rex and the Rialto were first run and second run theatres in 1926, and for a long time before and exhibited the first and second run product of Fox, Loew's, Paramount and Warner Bros.

Newman

"The Bay was built in 1945 at the suggestion of the United States Navy to provide a source of entertainment for the greatly increased population in East Bremerton. It was opened and has been operated by a subsidiary of Evergreen with second and fourth run product.

"The clearance applicable to all theatres in Bremerton is substantially the same, and its history shows a reduction in the number of days interval between exhibitions, which is consistent with the pattern of clearance history throughout the Northwest. Prior to 1934 and 1935, first run clearance over second run was generally 150 days, and now it is generally 90 days.

"Portland, Oregon

"Portland at the present time has altogether 52 theatres. Evergreen has an interest in nine of them. Four of the Evergreen theatres exhibit first run or product including one which plays short product and newsreels only. The first run Evergreen theatres in Portland are the Paramount, Orpheum and Oriental and the Newsreel. Three of Evergreen's theatres, the

(2748)

Music Box, Mayfair and Playhouse, are operated as moveover theatres. All of these theatres are located in the central downtown district of Portland, except the Oriental which is located less than a mile from downtown, in a shopping area. In addition to the first run Evergreen theatres, there are two other first run theatres in Portland, the Broadway and the United Artists, which are both operated by independent exhibitors.

Neuman

"The other two theatres in which Evergreen has an interest are the Liberty and the Hollywood which play respectively second and third run product.

"Four of Evergreen's theatres in Portland, the Hollywood, Newsreel, Liberty and Music Box theatres, were a part of the circuit acquired by Wesco in 1927 from North American Theatres, Inc., along with four others, the Broadway, United Artists, Highway and the State in which Evergreen no longer has any interest. The Broadway and United Artists are now operated by independent exhibitors in competition with Evergreen's first run theatres in Portland, and the Highway and the State, neighborhood houses, are operated as subsequent run theatres by unaffiliated exhibitors.

"The interests of Northwest or Evergreen in the rest of Evergreen's theatres in Portland were acquired generally in separate, independent negotiations with the respective owners or lessors.

(2749)

"The Paramount theatre is the best theatre in Portland. It has a seating capacity of 3,054, and in 1945 had a total assessed value of \$422,605. The assessed value of its equipment alone amounts to \$27,980. The Paramount was built in 1928 by Paramount as an outlet for its product. Pacific Northwest Theatres, Inc. first acquired an interest in the Paramount in 1931. The interest of Northwest was terminated in bankruptcy, and thereafter through direct negotiations with the owner, a new lease was acquired in 1933 by a subsidiary of Evergreen, which has operated the theatre ever since. The Paramount has always shown first run product before the acquisition of any interest by Northwest or Evergreen companies.

Newman

"The Orpheum theatre was built in 1912 and for many years was operated principally on a vaudeville policy by Alexander Pantages. Between 1927 and 1932 RKO operated the theatre and between 1932 and 1935, the Orpheum was operated for a time by unaffiliated exhibitors. Evergreen acquired its interest in the theatre in 1935, and continued to have an interest until 1940. In 1940, the theatre was operated briefly by an unaffiliated exhibitor. Later in 1940, the theatre property was sold, and a subsidiary of Evergreen thereafter acquired a lease from the new owners. The Orpheum has 1,732 seats and in 1945 was assessed

(2750)

for a total of \$281,735. It consistently has shown first run product when operated as a motion picture theatre.

"The Mayfair (1,498 seats), formerly called the Rialto, was one of the theatres acquired and operated by Pacific Northwest Theatres, Inc. prior to its bankruptcy. The lease on the theatre was disaffirmed in bankruptcy, and thereafter, in 1934, a new lease was obtained by a subsidiary of Evergreen. The Mayfair was re-equipped in 1943 at a cost of \$14,094, and was assessed in 1945 for \$227,160.

"The Music Box has 895 seats and in 1945 was assessed for a total of \$123,510. It was operated by Pacific Northwest Theatres, Inc. and earlier by North American Theatres, Inc., under the name, People's, as a first run theatre. In 1930, Northwest ceased to have an interest in the theatre. Evergreen reacquired an interest in 1935.

"The Playhouse theatre was for many years the outstanding legitimate theatre in Portland. Evergreen first acquired an interest in this theatre in 1935. It was assessed in 1945 at \$68,750 and has a seating

Newman

capacity of 1,255. During most of the period of its operation as an affiliated theatre, the Playhouse has been a subsequent run theatre. At the present time, it is operated on a first run moveover policy. The

(2751)

great increase in population, and the presence of a vast number of service personnel in the last five years in Portland created a distinct need for additional first run theatres. It was for this reason that the policy of the Playhouse was changed.

"The Oriental theatre is a neighborhood theatre located less than a mile from the downtown business center. There is no other neighborhood theatre in Washington, Oregon and Idaho comparable with the Oriental, in size, facilities and in its beauty of decoration. It compares favorably with the finest of first run metropolitan theatres. The Oriental because of its luxuriousness, location and quality of its equipment draws its patronage from nearly all points in the city, as well as from the outlying towns. It was assessed in 1945 for \$235,265 and has a seating capacity of 2,038. The theatre was built in 1928, and Evergreen first acquired an interest in it in 1935. Before an interest in the theatre was obtained by Evergreen, the Oriental exhibited first and second run product. From 1935 to 1944, the Oriental exhibited fourth run product. Thereafter, for the same reason which caused the changing of the Playhouse from a subsequent run theatre to a first run theatre, the Oriental commenced to play first run product. The fourth run product previously exhibited at the Oriental is now licensed to an independent exhibitor who operates the

(2752)

Bagdad.

Newman

"The theatres operated by independent exhibitors in competition with Evergreen theatres license the first run product of Loew's, United Artists, Universal and one-half of Warner Bros., charge identical admission prices and take the same clearance as the Evergreen first run theatres. The Evergreen first run theatres license the product of Fox, Paramount, Columbia, RKO, Monogram, PRC and one-half of Warner Bros.

"The Newsreel theatre, formerly the Rivoli, was acquired in 1927 by Pacific Northwest Theatres, Inc. along with the rest of the circuit operated by North American Theatres, Inc. The interest of the Fox defendants in the Rivoli did not survive bankruptcy. In 1939 through negotiations instituted by the owner, a subsidiary of Evergreen obtained a lease on this theatre. It was operated thereafter for a few years with second run product. Subsequently it was converted into a newsreel house.

"The Liberty theatre was formerly operated by Pacific Northwest Theatres, Inc. and earlier by North American Theatres, Inc. At the time of the bankruptcy of the former, the lease on the theatre was terminated and thereafter a new and distinct lease was obtained by a subsidiary of Evergreen. The Liberty in 1945 has an assessed value of \$227,000 and a seating

(2753)

capacity of 1,832. It was built in about the year 1916, and for the major part of its existence has been a first run theatre. At the present time it is being operated with a second run product.

"The Hollywood theatre was likewise one of those in which an interest was acquired by Pacific Northwest Theatres, Inc. in 1927 from North American Theatres, Inc. The Hollywood is a neighborhood house

and like the Oriental is an unusually fine theatre with a fireproof structure, the finest of projection and sound equipment, excellent carpeting and interior decoration. The Hollywood has a seating capacity of 1,491 and in 1945 was assessed for \$102,775. The fee of the Hollywood theatre is owned by a subsidiary of Evergreen, and is operated by another to which the theatre is leased. The Hollywood has for many years played third run product.

"Portland has an unusually high total theatre seating capacity for a city of its size, and for that reason, clearance and theatre playing time has been a problem of more than usual complexity for Portland exhibitors and distributors. Portland, with an estimated population now of 415,000, which is in excess of its 1940 population by more than 100,000, has a total theatre seating capacity of 46,363. Seattle, which is larger than Portland in population by 55,000,

(2754)

has about 6,000 fewer theatre seats than Portland. Thirty-three of Portland's fifty-five theatres are located in neighborhood areas, and the clearance problems have been especially difficult as to these thirty-three neighborhood theatres. Consequently, there has been almost continuous negotiation between distributors and exhibitors for a period of fifteen years. At the present time first run clearance is 42 days after the close of first run showing, or after the third week thereof, whichever is earlier. Up until 1940, first run clearance was not computed until after the close of the first run showing. As it stands now, first run exhibitions of longer than three weeks do not affect availabilities of subsequent run theatres. The following is

Newman

the availability generally applicable to each run after first licensed in Portland:

"Second run	42 days
Third run	56 days
Fourth run	70 days
Fifth run	77 days
Sixth run	84 days
Seventh run	91 days
Eighth run	126 days
Ninth run	161 days

These are not the precise availabilities in each case on the product of each distributor. The number of days varies. These figures represent the average number of days availability.

(2755)

"The fourth to the ninth run inclusive are all licensed to independent exhibitors.

"In addition to the theatres in the foregoing cities of more than 50,000 population, Evergreen or Pacific is interested in the operation of three theatres, two first and one subsequent run, in Bellingham, Washington, three, two first and one subsequent run, in Everett, Washington, two, one first and one subsequent run, in Vancouver, Washington, and two, one first and one subsequent run, in Eugene, Oregon. These four communities have a population of less than 50,000 but more than 25,000. In each, there are from one to three theatres operated by unaffiliated exhibitors in competition with the theatres of Evergreen or Pacific.

Newman

"In Bellingham, the competing, independent first run theatre, the Grand, is operated with the first run product of Columbia, Universal, Republic and one-half of Warner Bros. The other unaffiliated theatre exhibits the third run product of Columbia, Fox, RKO and Warner Bros., and spot books the product of Paramount.

"In Everett, the independently operated theatre, the Roxy, exhibits the first run product of Republic, the second run product of Warner Bros. and Universal, and the third run product of Loew's and Paramount.

(2756)

"There are two unaffiliated theatres in Vancouver, the Mission and the State. The Mission shows the first run product of Columbia, Republic, Universal and RKO. The State plays the second run product of Warner Bros. and the third run product of Columbia, Loew's, Fox, RKO and Republic.

"In Eugene, Oregon, three theatres are operated by unaffiliated exhibitors. For one, the Heilig, the exhibitor licenses the first run product of Columbia, RKO, Republic and Universal. Another, the Mayflower, is operated on a moveover policy with the same product which is licensed for the Heilig. The third independent theatre in Eugene exhibits the second run product of RKO and Universal and the third run product of Loew's, Fox, Warner Bros. and United Artists.

"Evergreen is also interested in theatres located in four towns in Washington with a population under 25,000 each. Evergreen has an interest in two theatres in Aberdeen, one of which has been closed for several years because of its poor physical condition. It also has an interest in one in Hoquiam, one in

Newman

Olympia and two in Wenatchee. In each of these towns, Evergreen's theatres are operated in competition with theatres of other exhibitors. In Aberdeen and Hoquiam, theatres affiliated with Warner Bros. compete with those of Evergreen. In Olympia and

(2757)

Wenatchee the competition is with theatres operated by independent exhibitors.

"Neither Evergreen nor Pacific has any interest in the theatres operated in Tacoma, Washington, a city with a 1945 estimated population of 139,000, or in Yakima, Washington, whose population in 1945 is estimated to be 33,400. Moreover there are 16 cities and towns in Washington and 17 cities and towns in Oregon with 1940 populations ranging from 4,000 to 25,000, in which neither Evergreen nor Pacific is interested in the operation of any theatre.

"Evergreen has not conspired or combined with, and has no agreement or understanding with, any other defendant in this case to restrain interstate commerce or to monopolize or attempt to monopolize interstate trade or commerce in the distribution or exhibition of motion pictures. It has no agreement, express or implied, with any defendant, relating in any way to the distribution or exhibition of motion pictures other than the express license agreements which it has made for the licensing of pictures in its theatres.

"I also deny that Evergreen or Pacific, either individually or in conjunction or combination with any other person, has engaged in any practice which is unfair or discriminatory with respect to any exhibitor with which it competes.

(Sgd.) FRANK L. NEWMAN, SR."

Rhoden

(2758)

(The affidavit of ELMER C. RHODEN is as follows:)

"IT IS HEREBY STIPULATED by and between counsel for the plaintiff herein, and counsel for the defendants, Twentieth Century-Fox Film Corporation and National Theatres Corporation, that if called as a witness in this proceeding ELMER C. RHODEN would testify as follows:

"ELMER C. RHODEN, being duly sworn, deposes and says:

"I am now, and since 1935 have been, the President and operating head of Fox Midwest Theatres, Inc. (hereinafter referred to as 'Fox Midwest'), a Delaware corporation, having its principal office and place of business in Kansas City, Missouri. All of the stock of Fox Midwest is owned by National Theatres Corporation, a defendant in this proceeding.

"Fox Midwest is interested, directly or through corporations the stock of which is owned by it, in the owning, leasing and operation of 128 theatres in the States of Missouri, Kansas, Illinois, Nebraska and Iowa. Of these theatres, 115 are open and 13 are closed. Most of these theatres are located in what is generally known as the Kansas City Exchange territory. By that is meant that films are supplied to such theatres through the exchanges maintained by the respective distributors in Kansas City, Missouri.

(2759)

"I have been associated with the motion picture business for a period of approximately 33 years. My first employment was with General Film Company as a shipping clerk in 1912 while still at school. In

Rhoden

1917, I became a salesman for General Film Company, working out of Omaha. In the fall of 1917, I went into the Army and, upon my return, became a film salesman for A. H. Blank, who had a theatre circuit and was a First National franchise holder. I was a film salesman in Omaha and eastern Iowa for the A. H. Blank Enterprises and came to Kansas City in 1920 as manager of the interests of that company in that area. During the next five or six years, I bought out Mr. Blank's interest and organized Midwest Film Distributors. I then acquired certain theatres and, in 1927, formed Midwest Theatres, Inc., an independent circuit which held leases on approximately 11 theatres at the time the corporation was formed. I entered into partnership with Mr. L. M. Miller, a prominent citizen of Wichita, Kansas, who at that time had a number of theatres. Additional theatres were acquired by our partnership. Our theatre interests were sold to a company controlled by Fox Film Corporation in October, 1929, in the manner more fully described hereinafter. I entered into a five-year contract with Fox to

(2760)

operate the theatres which we sold and any additional theatres which might be acquired in the territory.

"For several years I was President of the Film Board of Trade in Kansas City, Missouri.

"I am familiar with the claims made by the Government in its complaint and the contents of this statement will be addressed to them.

"THEATRE GROWTH AND DEVELOPMENT IN THE KANSAS CITY EXCHANGE TERRITORY PRIOR TO 1929—THE DATE WHEN FOX WEST COAST ACQUIRED INTERESTS IN CERTAIN OF THESE THEATRES.

"The acquisition of theatres in this territory by a subsidiary of Fox West Coast in or about 1929 came

Rhoden

at the conclusion of a period of theatre growth which was characterized in its later stages by circuit operations. The development of circuits was a natural incident of the development of the motion picture business. In the first place, the quality of product had considerably improved. The era of arcades and store exhibitions had come to a close. The enhancement in the artistic and cultural value of films created an increased popular demand for better and more expensive pictures. It became imperative for theatre operators to construct larger, more luxurious and commodious theatres, equipped with the latest improvements. The

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motion picture business was subjected at this point to the same familiar economic forces which inevitably condition any young industry, which is passing through the cycle of rapid development and expansion. The construction and operation of such ventures required larger units of capital than had theretofore sufficed to meet the needs of the industry. It was during this period that great activity developed in construction and expansion on the part of independent operators and distributors.

"The activities of my partner, Mr. Miller, and myself in the field of theatre construction and acquisition, more fully described later, were dictated solely by considerations such as those outlined above. We realized perfectly well that our survival in this business depended upon the construction and acquisition of theatres which would meet the exacting demands of the public and the needs of the distributors for appropriate outlets for the exhibition of their films. We were not motivated by any desire to stifle competition or to monopolize or attempt to monopolize. Our business activities were actuated solely by what we then considered to be and what I still regard as enlightened

Rhoden

self-interest. It was a choice either of meeting the growing competition or retiring from business. We chose the former course and availed ourselves of such

(2762)

legitimate means at hand as would insure the success of our business.

"Some of the more important historical highlights of the period just described were the following:

"As early as 1920, Mr. L. M. Miller, who was later to go into partnership with me, had several theatres in Wichita, Kansas. Mr. M. B. Shanberg had theatres in Hutchinson, Junction City and Salina, Kansas. Mr. Frank Newman already had built the first de luxe houses in Kansas City, Missouri, namely, the Newman, Royal, Regent and Twelfth Street theatres.

"In 1923 and 1924, an organization known as Capitol Enterprises, Inc., acquired about 15 theatres, of which 6 were in Kansas City. In 1924, while this circuit was still in process of creation, it was purchased by Universal. During the next few years, Universal acquired some additional theatres in Kansas City and others in Missouri and Kansas. In Kansas City, it built the Uptown theatre, which was subsequently acquired by Fox Midwest, as more fully described later. Early in 1929 Shanberg acquired all of Universal's theatres and this marked the end of Universal's theatre operations in this territory.

(2763)

"The Paramount interests had already entered Kansas City. Some time in 1924 or 1925, they purchased the Newman and Royal theatres from Mr. Frank Newman.

"During this period, the Shanberg circuit also expanded rapidly. In addition to those theatres operated by Shanberg and those acquired from Universal, various other theatre interests were secured. At the

Rhoden

time of the sale to the Fox interests in the fall of 1929, the Shanberg organization was operating approximately 60 theatres in Missouri, Kansas and Iowa. Virtually all of these theatres were being operated under leases or other arrangements.

"In 1928 Woolf and Shanberg built the Midland theatre, one of the largest and finest theatres in Kansas City, Missouri. It was and is a de luxe, downtown theatre with about 3,600 seats. Within a year, it was sold to Loew's and is still operated by it under the name of Loew's Midland.

"At approximately this time, the so-called Miller and Rhoden circuit, in which I was a partner, was also established. Mr. Miller was a theatre operator in Wichita and had acquired several theatres there in addition to substantial investments in real estate which he held.

"In about 1925, I came into control of Mr. A. H. Blank's film exchange and, in partnership with L. M. Miller, began operating it as an independent exchange.

(2764)

The exchange had formerly been known as the Midwest Photoplay Company. Mr. Miller and I changed its name to Midwest Film Distributors, Inc.

"In 1926 we began acquiring theatres either in our own names or in the name of Midwest Film Distributors, Inc. Shortly thereafter, we formed Midwest Theatres, Inc. and turned over to it the theatres which we had acquired. Some of these theatres we owned, others we leased. By 1929 we were operating 37 theatres, of which 4 were in Kansas City, Missouri. The others were located in Kansas and Missouri.

"I attribute the expansion of the Miller and Rhoden circuit primarily to efficient management and operation; the favorable business standing and credit which we enjoyed, together with the substantial

Rhoden

amount of capital which was invested in our enterprises, and last but not least, the advent of sound pictures. The cash investment of Mr. Miller and myself in these theatres was in excess of one million dollars. In addition to this capital investment, we had assumed a number of obligations.

"We acquired many of our theatres, with the exception of those located in Wichita, from so-called independent operators. We were able to acquire these theatres not because of any particular advantages due (2765)

to our ownership of other theatres, but, rather, because of a hesitancy on the part of many operators to make the substantial investments or commitments necessary to keep pace with the times. Particularly was this so with respect to equipping their theatres for sound. From 1926 to 1929, it had become apparent to me that sound pictures were supplanting the silents and that the latter would soon disappear. Independent operators in Kansas were doubtful as to what would be the effect of the transformation. Sound equipment was quite expensive and many of these exhibitors preferred to dispose of their theatres rather than to assume the risks of further investments.

"Meanwhile, theatre growth was not restricted to circuits but continued to advance under the direction of so-called independent operators, particularly in the large cities such as Kansas City, Missouri. That was true not only then but remains true today, as I shall point out more specifically when I come to discuss some of the particular communities in which Fox Midwest operates.

"Just as the exhibitors found it necessary to construct larger, more luxurious and commodious theatres to meet the current demands of the public and

Rhoden

the preferences of the film companies so, also, did the distributors vie with each other for the exhibition of
(2766)

their finer and more expensive productions in these better showplaces. In order to assure a sufficient number of outlets for exhibition of their pictures, they proceeded to acquire some of the finest theatres in the country.

"In 1928 and 1929, competition developed for the acquisition of various theatre interests in Missouri and Kansas on the part of the distributors. Circuits of theatres with whom distributors were negotiating also evinced an interest in acquiring our theatres. In the summer of 1929, one Max Kravetz, acting as an agent for a subsidiary of Fox Film Corporation, came to Kansas City to negotiate directly for the acquisition of theatres. He submitted a proposition to Mr. Miller and myself as to which he and I were not in complete agreement. Mr. Miller wished to sell because he believed that he had too much money tied up in theatre real estate in Wichita and was anxious to liquidate. After considering the entire proposition, I agreed to sell. In connection with the transaction I was employed to manage the operation of these and all other theatres which might be acquired in the territory.

"At the same time that Mr. Kravetz was negotiating with Mr. Miller and myself, he was also conducting negotiations for the acquisition of other theatres
(2767)

in this territory. I have previously described the development of the Shanberg theatre organization. At that time, it was interested in 61 theatres. Paramount, at the same time, was negotiating with Mr. Shanberg. Mr. Kravetz also submitted a proposition and was successful in securing the purchase of these

Rhoden

theatres. The total purchase price was in excess of \$4,000,000, the payment of a portion of which was deferred over a period of time. Mr. Shanberg was employed at a substantial salary until such time as the purchase price could be paid in full, although, in 1931, his employment contract was terminated and the management of all the theatres vested in myself.

"Certain other acquisitions were made by the Fox subsidiary in the summer of 1929, including the Reid, Yemm and Hays circuit and the Fresina circuit, which were engaged in theatre operations in southern Illinois. Mr. Kravetz also had negotiations with other smaller exhibitors and acquired certain small groups of theatres as a result. As to these as well, the general competitive situation relating to theatre acquisitions hereinabove referred to, also existed.

"Upon the conclusion of these various transactions, the Fox subsidiary which took over the theatres had interests in about 150 theatres. As the operations

(2768)

of this new company developed, it early became apparent that it could not be profitably operated. From 1931 until 1933, when it went into bankruptcy, it continuously lost money. This was due in part to the inflated prices paid for the properties and the character of some of the properties themselves. A number of the theatres were simply not worth operating and some of them were abandoned. Other theatres had been closed at the time they were acquired and were not worth reopening. Because of unprofitable operations, it was necessary to close other theatres. General economic conditions had become steadily worse. All of the properties had substantial carrying charges, which represented a continual drain on the resources of the profitable theatres.

Rhoden

"In March of 1933, the Fox subsidiary filed a voluntary petition in bankruptcy. Its operations were taken over by trustees. The number of theatres which were operated by the trustees had diminished to 110 in 1933. In 1934 and 1935, 107 theatres were being operated. The reorganization of the company was completed in January, 1935. The reorganization plan provided for the complete payment of all allowed claims and the properties were vested in the present Fox Midwest Theatres, Inc.

(2769)

**"TRADE PRACTICES IN THE MOTION PICTURE INDUSTRY
IN THIS TERRITORY IN EFFECT UP TO 1929—THE YEAR
OF THE WEST COAST ACQUISITIONS.**

"During my association with the motion picture industry prior to the time when Fox Film Corporation made any of the acquisitions heretofore referred to, I became familiar with the manner in which films were licensed to exhibitors by the distributing companies and the conditions and circumstances of such licensing.

"Basically, the licensing of film and the fixing of runs and clearances were determined much the same as they are today. The same criteria which today determine the reasonableness of clearance, the relative priority of run to be accorded to any given exhibitor, or the terms under which pictures are to be licensed were substantially the same when the number of affiliated theatres was insignificantly few. These same standards continue to apply to individual situations today irrespective of the character of the operation, be it independent or affiliated. It has always been generally the fact that the largest, most luxurious and commodious theatres receive a prior run

Rhoden

(2770) over theatres which were physically less capable of affording the distributors a proper outlet for first

showings of their finest pictures and providing the maximum amount of revenue which could be obtained. This is, and has always been true regardless of affiliation or non-affiliation.

"As a film buyer, I have always tried to obtain for my theatres, the best possible run of pictures at what I considered to be reasonable rentals. I did not always agree with the distributors on what was a reasonable rental or the run which was given to my theatre. In some instances, I was given a playing position which I would have preferred to improve. In other instances, I paid more for film than I should have liked to have paid. In almost all instances the result of the bargaining process which took place between distributor and exhibitor was a deal which represented a compromise of the individual interests of both.

(2771) "In short, the situation with respect to the licensing of film prior to the Fox acquisitions was the same as it is today. There were fewer 'percentage pictures' at that time but film rentals were often computed on such a basis. Provisions for minimum admission prices were also inserted in contracts between the exhibitors and distributors in those days. Clearance

was then, as it still is, considered to be a vital and essential factor in the industry for the protection of both the distributor and the prior run exhibitor.

"DESCRIPTION OF PRESENT CORPORATE STRUCTURE AND
GENERAL BUSINESS PRACTICES OF FOX MIDWEST.

"I have already stated that all of the stock of Fox Midwest is owned by National Theatres Corporation,

Rhoden

which also owns the stock of a number of other companies engaged in the operation of theatres.

"The business of Fox Midwest is carried on autonomously as an independent business enterprise. The management, operation and general policies of Fox Midwest are directly under my supervision and control. The directors of Fox Midwest are: E. C. Rhoden, Charles E. Shafer, J. C. Nichols, James M. Kemper, Herbert V. Jones and Charles P. Skouras. All of them except Charles P. Skouras are residents of Kansas City, Missouri. It is true that the financial interest which National Theatres Corporation has in Fox Midwest subjects the latter to a certain amount of direction by the former with respect to certain financial transactions, such as the construction of new theatres, improvements, acquisitions or other capital

(2772)

commitments. In every other respect, however, I am entrusted with complete authority and discretion in the management of the company.

"Fox Midwest Amusement Corporation was organized by Fox Midwest Theatres, Inc. as a service corporation designed to handle the many details of management incident to the operation of the theatres in this large territory. It has a total personnel of 1,982—102 of which are in the home office in the Uptown Theatre Building, Kansas City, Missouri. The remaining 1,880, including managers, are employed in the theatres themselves.

"Various departments of the organization have been created for the purpose of carrying out all functions incidental to the operation of the theatres. These include the licensing and booking of pictures, advertising, purchasing of supplies, auditing of accounts in the field, real estate and insurance, maintenance, etc.

Rhoden

"Most of the personnel in these departments are highly trained and have a specialized knowledge of conditions in this particular territory. This is especially true of the buying and booking department, the personnel of which see all pictures that are licensed

(2773)

by Fox Midwest for the purpose of evaluating and judging their comparative merits and quality. Their knowledge of the various communities in which Fox Midwest operates theatres and the local tastes and prejudices of their inhabitants must be fairly complete.

"Film license agreements are separately and independently entered into between Fox Midwest and each distributor from whom it licenses film. In many instances the bargaining process is quite protracted. It is and always has been considered of the utmost importance that any given distributor does not know the specific terms of any deal entered into between an exhibitor and another distributor. Accordingly, it has been the policy of Fox Midwest to treat such matters as confidential trade secrets in so far as it is within its power so to do. Similarly, I have no knowledge nor has any distributor at any time supplied me with any information concerning the film rentals paid by any theatre which is competitive with a Fox Midwest theatre. On the contrary, it is to the advantage of a distributor not to divulge such matters to us for the obvious reason that its bargaining position might be adversely affected if an exhibitor had specific knowledge of such matters. This is true whether the ex-

(2774)

hibitor be affiliated with a producer or not.

"It is quite true that certain features of the license agreements have become somewhat standardized be-

Rhoden

cause of long experience and usage in the industry. On the other hand, certain provisions of the license agreement which relate to the terms upon which specific pictures are licensed are determined wholly as a result of the bargaining process with each separate distributor. I may point out in this connection that even as between Fox Midwest and Twentieth Century-Fox Film Corporation, the producer-distributor with which Fox Midwest is affiliated, there is as much bargaining and haggling over the terms under which specific pictures are to be played at specific theatres as there is with other distributors. I recall many instances of important differences of opinion between Fox Midwest and Twentieth Century-Fox Film Corporation in connection with the licensing of its product and the specific film rentals to be paid therefor.

"It is also far from true that there is complete uniformity even on matters of form, although such uniformity as does exist is attributable, as I have said, to long experience and usage in the industry. In

(2775)

Kansas City, Missouri, for example, the availabilities of subsequent run theatres are usually set forth in contracts between the various distributors and the subsequent run theatres and are fixed with relation to first run downtown. Thus, theatre X will be given an availability of 56 days following close of exhibition at the first run downtown theatre. Loew's, however, fixes the availabilities of subsequent run theatres with relation to prior runs other than first run downtown. The availabilities of subsequent run houses stem from third city run in some of Loew's contracts. In some other instances the availability of a subsequent run theatre stems directly from the theatre playing immediately prior to it in the competitive zone. While this

difference in the manner of framing contracts is, of course, one of form only, it is cited to show that the distributor and the exhibitor each bargain for the express purpose of reaching a deal which will suit and serve his or its own individual interests best.

"Fox Midwest enters into contracts with the distributors only for theatres in which it is interested.

(2776)

"There are many occasions where a distributor may already have negotiated license agreements for certain pictures with another subsidiary of National Theatres Corporation before it does so with respect to the theatres of Fox Midwest. It sometimes happens, under such circumstances, that the agreement thus arrived at, particularly those provisions relating to terms, may be used as a basis for the negotiations with the distributor, relating to the theatres of Fox Midwest. It is in some instances even adopted by the parties in negotiating the deal for this territory. Under no circumstances, however, is Fox Midwest bound by any commitments so made by other subsidiaries of National Theatres Corporation, and all deals made with respect to the theatres of Fox Midwest are consummated with special attention to its requirements and needs.

"Before any license agreement becomes effective it must receive my approval. In the negotiation of film licenses in practically all instances, separate consideration is given to each particular theatre in which Fox Midwest is interested, and a separate and specific deal is made on the basis of each individual theatre.

"In most instances, the terms under which film is
(2777)

licensed to the Fox Midwest theatres vary with each picture, each theatre and each distributor. There is absolutely nothing uniform about this. The license

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agreements covering certain theatres operated by Fox Midwest provide for the payment of flat rentals. These fixed rentals will vary in amount with each company, depending upon the quality of the picture licensed. In some other theatres the license agreements provide for the payment of film rental determined by a certain percentage of the gross business done by the theatre. These 'percentage deals', however, also vary according to distributor and the quality of the product. In some instances the license calls for the payment of a specified percentage of the gross receipts. In another a sliding scale is provided for under which the returns to the distributor will vary in accordance with the volume of business done by the theatre on the particular picture. The nature of the formula used depends entirely upon what the parties decide as a result of their negotiations.

"As to these 'percentage deals', the parties simply agree that the distributor is entitled to a rental which is to be measured by the gross receipts received at the box-office. This criterion is based upon the proposi-

(2778)

tion that the quality of a picture is determined by box-office grosses, and film rentals, to be fair to both distributor and exhibitor, should bear a definite relationship to the quality of the film.

"Two of the most important provisions in a license agreement are clearance and admission price. Both factors are important to the distributor and the exhibitor. A first-run exhibitor whose theatre represents a substantial investment, who has undertaken to pay a high guaranteed film rental plus a percentage of the gross receipts and who proposes to charge a high admission price, is entitled to the assurance that a reasonable period of clearance will elapse between the close of

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exhibition of a picture at his theatre and the exhibition of the same picture in a subsequent run theatre which represents a smaller investment, charges a lower admission price and pays substantially less film rental to the distributor. Unless these considerations are accorded their proper weight in the licensing of film, it is obvious that the ability and capacity of the prior run exhibitor to secure patronage at its top admission price will be affected, with the result that

(2779)

its contractual undertakings with the distributor will be placed in jeopardy.

"On the other hand, I have absolutely no interest in fixing the maximum price which a subsequent run exhibitor may charge. In fact, the higher he pegs it the better it is for the prior run exhibitor. For example, the first run theatres in Kansas City, Missouri, including the Fox Midwest houses, now charge a top admission price of 65 cents. Should a subsequent run exhibitor in that city raise its price to 65 cents, his theatre will become less competitive to the first runs than theretofore.

"I have never entered into any agreements or understandings with any distributor having the purpose or effect of fixing the prices to be charged by a subsequent run theatre, and there would be no business reason which would impel me to do so.

"Contractual provisions for clearance are usually not renegotiated each time the parties consummate a deal for a particular block of pictures. These items are agreed upon in the first instance, only after consideration has been given to numerous factors of business policy and local conditions, upon the basis of which definite clearances are fixed and are readopted in all future negotiations, unless specific conditions

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or circumstances require a change. There are some
(2780)

instances where clearances in favor of Fox Midwest theatres have been eliminated or voluntarily reduced where it became clear that the length of the existing clearance was not justified in the light of current conditions.

"In entering into license agreements with the distributors, Fox Midwest does not condition the licensing of pictures in some of its theatres upon the making of a deal with the distributor for all of its theatres. It frequently happens that the parties are unable to negotiate an agreement for certain Fox Midwest theatres but succeed in arriving at a satisfactory deal with respect to other theatres. Where that happens, the pictures as to which a satisfactory deal has been made are licensed and exhibited by Fox Midwest and the distributor is free to make other licensing arrangements in those situations as to which it was unable to reach an agreement with Fox Midwest.

"When Fox Midwest negotiates with any distributor for the licensing of film, it does not know and has no interest in whether or not the Twentieth Century-Fox Film Corporation has or has not licensed its product to theatres in which such distributor is interested.

(2781)

"Fox Midwest is interested in obtaining for its theatres the best product available on reasonable terms. When it desires to exhibit in one of its theatres an outstanding attraction distributed by RKO, for example, it is not in the least concerned as to whether RKO has made an agreement for the exhibition of Twentieth Century-Fox pictures in RKO's theatres located in some other territory.

"My own personal, pecuniary interests impel me to act for the sole welfare and benefit of Fox Midwest.

Rhoden

I am not a stockholder of Twentieth Century-Fox Film Corporation and have no connection with that company. My employment is with Fox Midwest, and the terms of my contract provide for a certain fixed salary with a participation in the profits of the company. I am primarily concerned, therefore, in promoting the best interests of that company. I am not concerned with the effect which the policies of my operation may have upon the distribution policies of Twentieth Century-Fox Film Corporation.

"The Government claims that there is no real competition between theatres affiliated with different distributors in the same competitive area, and that such competition is artificial. My experience in Kansas (2782)

City, Missouri, demonstrates that this is not true. The Fox Midwest first run theatres in Kansas City, Missouri are definitely in competition with the theatres operated by Loew's, Paramount and RKO for the same movie dollars. Each company adopts a policy which is designed to procure the largest possible patronage. Advertising costs alone, intended to bring people from all over the area into the downtown section to see first run pictures, run into many thousands of dollars.

"As to the licensing of film, the fact that over a period of time the same product is licensed to certain theatres in no wise disproves the competitive nature of the situation. Each theatre usually continues from year to year to exhibit the product of the company with which it has been doing business. For one exhibitor to obtain product previously and over a period of time used by another exhibitor would require that it be able to effectuate a deal with the particular distributor which would insure the latter a much greater return than it had theretofore received from its exist-

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ing account. No exhibitor could possibly afford to buy up all available product, much less provide adequate playing time for its exhibition, especially now when attractions play on longer runs than has heretofore been the case. If a distributor is now securing

(2783)

fair and reasonable revenue and proper exploitation of its pictures in a desirable outlet, it has no particular interest in jeopardizing that position when no compensating advantages are offered. Where, however, a distributor is unable to reach a deal with an exhibitor or is in any other way dissatisfied with the account, it does have another available outlet with whom it can negotiate.

"What I have said with respect to film licensing practices applies whether or not the competing first run theatre is affiliated with a distributor or not. Examples of the continuation of the licensing of the same product to a first run theatre regardless of whether it is affiliated or independent will be referred to hereafter.

*"Theatre Situations in Cities and Towns
in which Fox Midwest Operates*

"I now take up the more important situations in which Fox Midwest has an interest.

"A. Kansas City, Missouri.

"Pop.	1940 Census	399,178
"Pop.	Present (Est.)	462,493

1. First Run

(2784)

"In Kansas City, Missouri, there are 51 theatres, 6 of which have first run in the city. Three first run

Rhoden

theatres are operated by Fox Midwest and one each by Loew's, RKO and Paramount, respectively. There are 45 second and subsequent run theatres, 12 of which are Fox Midwest theatres.

"FOX MIDWEST'S THEATRES.

"Fox Midwest operates the Uptown, Esquire and Tower theatres in Kansas City proper. It also operates the Fairway theatre, located in the Fairway residential addition in Johnson County, Kansas, just a short distance across State Line Road which fixes the westerly corporate limits of Kansas City, Missouri. The Esquire, Uptown and Fairway theatres play the best pictures of Twentieth Century-Fox, Universal and Republic, first run day and date. The Tower theatre, operated by Fox Midwest, plays pictures of nearly all producers which are considered unsuitable for first run single feature showing at the other three theatres. These pictures are exhibited at the Tower on a double feature program, first run, in combination with vaudeville.

(2785) "The Esquire theatre is located at 215 E. 12th Street, Kansas City, Missouri. The theatre was re-

modeled in August, 1938, and is in all respects a first class theatre. It has a seating capacity of 815. The theatre has all the latest improvements and accommodations in the way of equipment and appointments.

"The Esquire, when it was built in 1919, was known as the Twelfth Street. It later became the Downtown and eventually the Esquire. It was built by Richards & Flynn and intended as a first run outlet for First National. Fox Midwest acquired the theatre in 1936. It was renovated and its name changed to the Esquire in the summer of 1938.

Rhoden

"The Uptown theatre is located at 3700 Broadway. The theatre has a seating capacity of 2,043.

"It is a de luxe house in every respect, having been constructed in 1927 at a cost of nearly a million dollars. This theatre was built by Universal and leased to Shanberg. It was transferred to the Fox subsidiary in May, 1930, which later purchased the fee.

"The Tower theatre is located immediately adjacent to the Esquire on the east and seats 2,100 people. It is a modern, well-equipped and appointed theatre in every respect. The Theatre was built in

(2786)

1921 by the Pantages vaudeville circuit and opened with a combination of vaudeville and motion pictures. By 1929 it had become primarily a motion picture theatre. For some time prior to 1933 the theatre had been closed. In that year it was reopened by the Rewot Corporation, and the name changed to the Tower. Fox Midwest acquired control of Rewot, which also operated the Downtown, in 1936 and 1937 actually taking over the operation of the theatre in 1936.

The Fairway theatre was opened on June 12, 1942. It is located at 2600 West 52nd Street, in a section which has enjoyed rapid improvement and development during the past ten years. This area consists of the real estate subdivisions known as Mission Hills, Indian Hills Mission Woods, Fairway, Fieldton, Prairie Village, Westwood, Bryantwood, and Mission Highlands, and is a development of the J. C. Nichols Company, comprising a small portion of the elite residential area of the Country Club district.

"As a result of the congestion and substantial increase in movie attendance which was developing in

(2787)

the first run Uptown and Esquire theatres, I deemed it desirable to have another first run theatre to afford accommodations to the increased patronage in this growing area. I was also influenced by the wartime transportation problems affecting the residents of this section. It was finally decided to change the Fairway over to a first run day and date operation with the Uptown and Esquire on that product which played first run in those theatres, which was done on or about October 16, 1942.

"Although the theatre only seats 702, it is in every respect a fine house with all modern improvements and appointments.

"COMPETITIVE THEATRES.

"The RKO Orpheum theatre is located at 1212 Baltimore Avenue and has a seating capacity of 2,036. It is in every respect a de luxe theatre. It was originally designed to play vaudeville, which it did until 1928, when it closed. The Orpheum was reopened as a motion picture theatre in 1939 and has operated continuously as such since that time. It exhibits RKO and about one-half of Warner's product. Warners has no theatre in the Kansas City exchange territory.

(2788)

"Loew's Midland is located at 1228 Main Street and has a seating capacity of 3,573. It is the largest theatre in Kansas City and, for that matter in the Middle West. It was built in 1928 by the Woolf-Shanberg interests. In 1929 they sold it to Loew's and the latter has operated it since. It exhibits the product of M-G-M, United Artists and Columbia.

"The Newman theatre is located at 1118 Main Street and has a seating capacity of 1,917. It was

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built by Frank Newman in 1919 and was the first de luxe movie theatre in Kansas City. It is still a fine, commodious, well appointed theatre and has always operated on a first run policy. It exhibits Paramount and about one-half of Warner's product.

"THE MAINSTREET."

"The Mainstreet theatre is owned by Fox and RKO and is now closed. Fox Midwest's one-half interest was acquired in November and December, 1942 and RKO's one-half interest was acquired in January, 1943. The theatre was built in 1922 at the southwest corner of 14th and Main Streets in Kansas City, Missouri, and has a seating capacity of 3,049. The original cost of the theatre was approximately \$1,400,000. In 1926 it was valued at \$1,083,000. There have been no extraordinary additional investments since that

(2789)

time. It was operated primarily as a vaudeville and stage show house by the Kansas City Junior Orpheum Company, a subsidiary of Orpheum Theatre & Realty Co. In about 1931 or 1932, it went over to a motion picture house and closed in July of 1938. It was again opened November 6, 1941, by one Albert Schoenberg in association with Will Harris, a vaudeville operator from Chicago, and Ralph Goldberg, an exhibitor in Omaha, Nebraska. The venture was unsuccessful and the theatre closed again on January 5, 1942. During that two-months period, the theatre operated under a combination policy of vaudeville and one feature film of lesser box office attraction.

"In 1936, the Mainstreet was included in a so-called pooling of all the downtown first run theatres in Kansas City, except Loew's Midland. This lasted

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for approximately six months. I was chosen as the person to supervise the operation, including the Mainstreet. Despite the fact that the Mainstreet theatre had the very best pictures available from the major companies during this period, it did not bring in a large enough gross to make the house profitable, and in some weeks grosses dropped to less than \$5,000. There was no vaudeville played in the Mainstreet at that time and it was operating on a straight motion.

(2790)

picture policy. The theatre is located away from the heart of the downtown section and in a pawnshop, second-hand store type of neighborhood. Consequently, there was no drop-in or transit business.

"For many years prior to its acquisition by Fox Midwest and RKO, the Mainstreet was owned in fee by three separate interests.

"In 1942 a proposal was submitted to me for the acquisition of the fee to the Mainstreet on what I considered advantageous terms. At that time I had in mind the making of certain policy changes in the downtown operation. Accordingly Fox Midwest first acquired a one-half interest in the fee from the owners of that portion. Then the party who had undertaken to obtain the other one-half could not or would not do so and we subsequently discovered that this one-half interest had been sold to RKO for substantially more than Fox Midwest had arranged to pay. Prior to RKO's acquisition of this one-half interest, Fox Midwest commenced a partition suit against the then owner of the property. After RKO's acquisition an amended petition was filed and this suit is now pending.

"There can be no question but that the theatres which have the first runs in Kansas City, Missouri are by reason of their physical characteristics, equip-

Rhoden

ment, conveniences, appointments and locations peculiarly fit for first run exhibition. This was true when they were independently operated and it remains true today.

2. *Second Run.*

"Second run in Kansas City, Missouri, is shown at the Plaza theatre which is operated by Fox Midwest. The Plaza is one of the outstanding showplaces of the Mid-West from every point of view. It seats 1,861. It was built by J. C. Nichols Company in the Country Club Plaza district of Kansas City, Missouri. Originally, it was operated by Woolf & Shanberg. Fox Midwest acquired the theatre under lease from them in May, 1930. It charges an adult evening admission price of 55 cents, and plays the product of all major distributors.

"There is no subsequent run theatre in the entire territory which equals the Plaza either in its capacity for producing revenue for the distributors or in the quality of its physical characteristics and commodious appointments. It represents an investment in excess of \$200,000 to build, and is the most desired and sought after outlet by all distributors for the second run exhibition of their pictures.

3. *Subsequent Runs.*

"There are 44 other subsequent run theatres in Kansas City, Missouri, 11 of which are operated by

Fox Midwest. These subsequent run theatres themselves are in neighborhoods, each of which is considered a separate competitive area. In Kansas City, Missouri, there are approximately nine such areas

Rhoden

or zones. In each zone the number of theatres varies from three to nine. In each of them the run which any given theatre has depends upon a number of factors, among the most important of which are the physical characteristics of the theatres themselves, their potential capacity to produce the greatest amount of revenue for the distributors and the amount of film rental which any given exhibitor is willing to pay for a given run within the zone. In two zones certain theatres operated by independent exhibitors have prior runs over theatres operated by Fox Midwest. Mr. Jay Means operates the Oak Park theatre which is first run in a zone with six other theatres, one of which, the Linwood, is operated by Fox Midwest. The Oak Park charges an adult evening admission price of 45 cents and has an availability of 49 days after downtown first run. The Linwood charges an adult evening admission price of 35 cents and has an availability of 84 days after downtown first run.

"In another zone, the Ritz, a subsequent run theatre operated by Dr. N. Zoglin, plays ahead of the Benton theatre, which is operated by Fox Kansas City Corporation.

(2793)

"Where Fox Midwest has first runs in the neighborhood zones, the theatres themselves are physically superior to other theatres in the zone and are capable of producing more revenue for the distributors.

"There are theatres which are not located within the city limits of Kansas City but which are contiguous to it and are operated by independents with no local subsequent run competition from Fox Midwest. The areas in which these independent operators are located are Liberty, Independence, Fairmount, Belton, Blue Springs, Grandview, Lee's Summit. North

Rhoden

Kansas City, Highway 40 and 71 By-Pass (Drive-in theatre), all in Missouri, and Olathe and Bonner Springs, Shawnee and Mission, in Kansas.

"My attention has been directed to certain testimony given by Mr. William Kupper on cross-examination, which appears in the transcript of the testimony in this case beginning with page 1679 of the stenographic record. This relates to certain changes made in 1935-1936 respecting clearance in Kansas City.

"Prior to the 1935-1936 motion picture season, the availabilities of subsequent run theatres in Kansas City, Missouri and the surrounding territory were based upon admission prices. This general system of clearance based upon admission prices had existed in the area since approximately 1929. Under that

(2794)

system, theatres located within the same block or within a few blocks of each other and highly competitive with each other had a day and date availability, when the same admission price was charged at both theatres. This worked a particular hardship to the better theatres which paid higher film rentals than some other theatres which charged the same admission price. The difficulty became acutely accentuated during the period of the depression when admission prices were greatly reduced and the better theatres found themselves playing day and date with most of the theatres in the city although paying much higher film rentals and having much larger operating expense. The film exchanges were having to supply an inordinate number of prints and the situation was generally unsatisfactory. It was further complicated by give-aways, bargain nights and other indirect reductions in price. It was felt that this system was undesirable from the standpoint of distributor and

Rhoden

exhibitor alike, and destructive of the business of theatres in close proximity with each other. Attempts to remedy the situation during the N.R.A. period were shortlived.

(2795)

"Changes were proposed to Twentieth Century-Fox Film Corporation in a letter dated April 30, 1935, addressed to Mr. Ward Scott, District Manager of Fox Film Corporation by myself as Division Manager of Fox Midwest Theatres, Inc. I proposed, among other things, that particular runs be licensed to subsequent run theatres in these competitive neighborhood zones. This proposal contemplated the establishment of the principle of zoning as a supplement to clearance, which had been in operation in Kansas City prior to 1929 and which has successfully operated in many other parts of the country. I also negotiated separately with each other distributor. Each determined to license its pictures in line with this general idea.

"The propriety of these new arrangements relating to clearance was challenged by Mr. Emmanuel Belsky, and other independent exhibitors in Kansas City (including one Esterley who is hereinafter referred to), in a proceeding instituted in the United States District Court for the Western Division of the Western District of Missouri. After a full trial of the issues raised in that proceeding, the United States District Judge, Merrill E. Otis, dismissed the complaint, and in connection therewith made certain findings of fact bearing directly upon the legality and fairness of these new run and clearance arrangements

(2796)

as follows:

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"XXVI.

"The respective contracts made by defendant, Fox Midwest Theatres, Inc., with the respective distributors were made for valuable consideration on what is known as a clear run basis, but the runs in all of the contracts acquired by defendant, Fox Midwest Theatres, Inc., for particular theatres were in some instances prior to and in other instances subsequent to runs acquired by other theatres named in the particular contract as competitive to such theatre.

"XXVII.

"The competitive areas suggested by defendant, Fox Midwest Theatres, Inc., in its negotiations for contracts in the year 1935 for the 1935-1936 season were not originated at that time, but were substantially the same as those designated by it in the preceding year.

"XXVIII.

"The theatres in Kansas City, Missouri, owned, leased or operated by subsidiaries of defendant, Fox Midwest Theatres, Inc., do not as a whole enjoy, by virtue of the said contracts made in 1935, or any of them, superiority of runs and

(2797)

clearances as compared with the contracts made by defendant, Fox Midwest Theatres, Inc., in 1934 for the 1934-35 season, but, on the contrary, have on the average runs which are inferior to those enjoyed under contracts made in 1934 as respects priority of runs and clearances.

Rhoden

"XXX.

"The defendant, Fox Midwest Theatres, Inc., so far as shown by the evidence, at no time entered into and at no time has ever engaged with the other defendants in any conspiracy, contract or combination in unreasonable restraint of trade or commerce among the several states, or of a monopoly, attempt to monopolize or combination or conspiracy to monopolize to an unreasonable extent any part of the trade or commerce among the several states, substantial or otherwise, and whether having as its objects and purposes, the objects and purposes alleged in paragraph V of the plaintiffs bill of complaint herein, or any other objects or purposes.

"XXXI.

(2798)

"None of the plaintiffs has shown any damage or threatened damage by reason of anything done or threatened to be done by defendant, Fox Midwest Theatres, Inc., or any of the defendants."

"Furthermore, in the testimony referred to, there is the suggestion that, as a result of this change is clearance, Fox Midwest received some special privileges with respect to second and third run in Kansas City. This is not the fact. Prior to 1935, the Plaza theatre, the character of which has previously been referred to, had for a number of years been licensed second run in the Kansas City area. The third run had also, prior to 1935, been licensed to the Isis or Apollo theatres. These theatres continued to have the same second and third run, respectively, which they

Rhoden

had theretofore enjoyed and the change in clearance had no effect upon this situation in any way.

"With respect to this situation, Judge Otis, in the proceeding referred to above, also made specific findings of fact directly related thereto, as follows:

"XXIX.

"Under the evidence in this case, there is no complaint made of the runs provided by any of said contracts made in 1935 for the Uptown Theatre, the Plaza Theatre, the Isis Theatre, the Apollo Theatre, the Warwick Theatre, the Lincoln

(2799)

Theatre or the Benton Theatre. All of said theatres have for a number of years enjoyed at least as good runs as any provided for them in any of the said contracts made in 1935.

"The Fairway theatre was also mentioned in this testimony. I previously referred to it and its playing position, as well as the reasons it is being operated as it is at the present time.

"In this same testimony reference was made to the Rockhill and Bijou theatres in Kansas City and to the fact that there was a change in the playing position of these two theatres. The circumstances surrounding this are very simple and readily explicable. The Rockhill and Bijou theatres are located in a subsequent run neighborhood area and are competitive with each other. There are four other competitive theatres in this zone. The Bijou theatre had been closed on and off for a number of years when it was acquired by Mr. J. W. Cotter sometime prior to 1934. He operated it as a first run theatre in the zone, charging an admission price of 25 cents. The Fox Midwest Rockhill theatre played third run in the zone and charged 15 cents.

Rhoden

"In 1937 Mr. Cotter sold the Bijou theatre to one Esterley. Esterley operated another theatre in Kansas City on a low admission price policy of 10 cents or 15

(2800)

cents. After continuing Cotter's 25 cent policy for a short time Fox Midwest was advised that he had determined that it would be preferable for him to operate the Bijou on a subsequent run with lower admission prices and with consequent lower film rentals and that he proposed to discontinue buying the first run. Fox Midwest thereupon licensed the first run for the Rockhill theatre and increased its admission price from 15 cents to 25 cents.

"The change in the clearance situation which took place in the 1935-36 season, and which has previously been referred to, bore no relation whatsoever to this situation. In negotiating with the distributors during that season I indicated a willingness to license either first, second or third run for the Rockhill and made a specific offer as to film rental Fox Midwest would pay in accordance with the run which the distributors would license to the Rockhill. The various distributors refused to accept my offer to license a first run, but instead licensed it to the Bijou and the third run to the Rockhill.

"As to the question by the counsel for the plaintiff appearing on page 1682 of the transcript that when this change of run took place the Rockhill 'took a very substantial clearance over the Bijou,' the Bijou availability under its new playing position was no different from that which the Rockhill had when it played on a

(2801)

lower admission price. The Rockhill took no greater clearance over the Bijou than the Bijou had previously taken over the Rockhill.

Rhoden

"The seating capacities of the Rockhill and the Bijou theatres are 1,466 and 700, respectively. The Bijou is not located in a very desirable neighborhood. This is one of the reasons which contributed to the desire of its owner to play on a subsequent run at a lower admission price. It was likewise somewhat competitive with the Oak Park theatre, an independent operation which was playing first run in an adjoining zone. When the Rockhill licensed the first run in the zone instead of the third run it paid substantially higher film rentals.

"Thus the acquisition of the prior run by Fox Midwest came about by reason of the relinquishment by the operator of the Bijou of its first run in that neighborhood area.

"B. Wichita, Kansas

"Pop.	1940 Census	127,308
"Pop.	Present (Est.)	150,000

"There are 6 first run theatres in Wichita, Kansas, all of which are affiliated with Fox Midwest. They are the Miller (seating capacity 1,930), Orpheum (seating capacity 1,659), Palace (seating capacity 1,234),

(2802)

Wichita (seating capacity 906), Sandra (seating capacity 640) and Boulevard (seating capacity 972).

"The Miller, Orpheum, Palace and Wichita theatres were acquired by Fox in 1929 from Miller and Chambers. The Sandra was constructed in July of 1939 and subsequently sold to Fox Midwest. This theatre operates as a moveover. The Boulevard was opened in May, 1945, and is now playing first run pictures day and date with either the Orpheum or the Miller.

Rhoden

"Second run in Wichita is exhibited at the Uptown theatre (seating capacity 1,389), which is operated by Fox Midwest.

"There are 10 other subsequent run theatres in Wichita, all of which are independently operated. Since Fox Midwest made its initial theatre acquisitions in 1929, there has been a growth of independent competition in Wichita. As of January, 1930, Fox owned 5 of the 10 operating theatres in Wichita. At the present time it owns 7 of the 17 operating theatres in Wichita. In December, 1943, Fox Midwest acquired a theatre in Plainview located just outside of the southeasterly city limits. The availability of this theatre is subsequent to three independently operated subsequent runs.

"The first run theatres of Fox Midwest are in all respects the most suitable for first run exhibitions.

(2803)

"C. KANSAS CITY, KANSAS

Pop. 1940 Census	121,458
Pop. Present (Est.)	150,000

"Kansas City, Kansas, is located just across the Missouri River from Kansas City, Missouri. There are 14 theatres in this city, two of which are operated as first run houses, one by Fox Midwest and one by an independent.

"The Granada theatre (seating capacity 1,248) was built by Midwest Theatres, Inc., a Miller and Rhoden company, in 1929, prior to the time when our theatres were acquired by Fox Midwest. This is the only theatre operated in Kansas City, Kansas, by Fox Midwest. It has always been operated as a first run

Rhoden

theatre, and, in my opinion, is the most suitable theatre in Kansas City, Kansas, for this policy. At the present time, it exhibits the product of Twentieth Century-Fox, Loew's, RKO, Universal and United Artists, as well as the product of other so-called independent producers.

"The other first run theatre in this city, the Electric (seating capacity 1,500) is operated by Mr. Frank Grubel, an independent exhibitor. This theatre was constructed in 1906. Though it has been modernized from time to time and is suitable for first run exhibition in this city, it is not as modern, nor as desirable as the Granada theatre. At the present time the

(2804)

Electric theatre exhibits the product of Columbia, Paramount, Republic and Warner Bros.

"The first run theatres in Kansas City, Kansas, are in every respect superior to the subsequent run theatres and are the most suitable for first run exhibition.

"The 12 subsequent run theatres are all independently operated and are in no wise controlled by affiliated exhibitors. All of them vigorously compete with one another and with the first run theatres.

"D. TOPEKA, KANSAS

Pop. 1940 Census	77,749
Pop. Present (Est.)	80,563

"There are 13 theatres in Topeka, five of which are operated by Fox Midwest. Four of these theatres, the Grand (seating capacity 1,262), Jayhawk (seating capacity 1,344), Orpheum (seating capacity 690) and Gem (seating capacity 612) were acquired by Fox Midwest from Mr. Miller and myself in October of

Rhoden

1929. The Oakland theatre was acquired by Fox Midwest under a lease in May, 1940.

"The Grand, Jayhawk, and Orpheum operate on a first run policy, and exhibit the product of all distributors. The Gem plays second run.

"The first and second run theatres in Topeka, Kansas, are the best and most suitable for first and second run exhibition.

(2805)

The remaining eight theatres in Topeka are operated by independents and have seating capacities ranging from 300 to 600.

"The Oakland theatre, operated by Fox Midwest, plays a fourth run, subsequent to the independently operated Ritz, Cozy and Co-ed theatres, and on the same availability as the independently operated Dickinson, Glen, Princess, and Crystal theatres. Some theatres which had been closed at the time of the acquisition by Fox in 1929 have since opened and are being independently operated.

"E. SPRINGFIELD, MISSOURI

Pop. 1940 Census	70,514
Pop. Present (Est.)	72,000

"There are seven open theatres in this city, four of which are operated by Fox Midwest. Fox acquired the Gilliox (seating capacity 1,438) and Plaza (seating capacity 1,049) theatres from Woolf & Shanberg in 1930. The Plaza is now closed. The Gilliox is a first run theatre.

"The Electric (seating capacity 1,557) is a first run theatre which was acquired by Fox Midwest by lease in January, 1934. In 1933, Fox purchased the fee.

Rhoden

"The Kickapoo (seating capacity 820) formerly the Princess, is a first run theatre which was acquired (2806)

by lease in June of 1937. In 1944 it was completely remodeled and renamed the 'Kickapoo'.

"The Landers (seating capacity 1,080) is a second run theatre which was acquired by Fox Midwest from the Ensley Barbour estate in December, 1942.

"The Mozark (seating capacity 700) and Granada (seating capacity 700) theatres are operated by the Griffith circuit and have a third run. The Granada was built by independent operators after Fox Midwest acquired its theatres in Springfield.

"The Mulliken (seating capacity 619) is operated by the Dickinson circuit. Its policy of operation includes the showing of triple features. The Mulliken plays fourteen days behind the Mozark and Granada, usually on a spot booking basis.

"The physical characteristics of the first and second run theatres operated by Fox Midwest are in every respect superior to those of the subsequent run theatres and they are the most suitable theatres for first run exhibition.

"F. Springfield, Illinois

Pop. 1940	75,503
Pop. Present (Est.)	80,000

"There are seven theatres in Springfield, Illinois.

"Fox Midwest has only one theatre in this community, the Lincoln (seating capacity 993) which exhibits the product of Fox, United Artists and some of the product of Republic first run. This theatre (2807)

Rhodes

was acquired from the Frisina circuit in 1930. It is a well equipped, well located theatre, in all respects suitable for first run operation.

"The Roxy theatre (seating capacity 1,000) is operated by the independent Frisina circuit and exhibits the product of Warner and Universal first run.

"The Orpheum (seating capacity 2,000) is operated by Publix Great States Theatres Corporation which, I understand, is affiliated with Paramount. It exhibits the product of Loew's, Paramount and RKO first run.

"The Senate (seating capacity 1,000) is operated by an independent and exhibits the product of Columbia first run.

"The Tivoli (seating capacity 650) is operated by Frisina on a second run policy as is the Strand (seating capacity 700) which is operated by the same interests which operate the Senate.

"The Esquire (seating capacity 800) is operated by Frisina as a third run theatre.

(2808)

"The foregoing represent the only six cities in the Kansas, Missouri, Illinois, Iowa and Nebraska territory having a population of 50,000 and more in which Fox Midwest has theatres. In three of these cities there is independent or affiliated first run competition with Fox Midwest. In the remaining three cities Fox Midwest has all the first run theatres. In all of these cities, there is independent subsequent run competition.

"Fox Midwest also operates theatres in six cities which have populations of between 20,000 and 50,000, in this same territory.

Rhoden

"In four of these cities, namely, Belleville, Illinois; Salina, Kansas; Sedalia, Missouri and Council Bluffs, Iowa, independent operators exhibit major product first run in competition with the first run theatres operated by Fox Midwest. In the other two cities, namely, Hutchinson, Kansas, and Joplin, Missouri, Fox Midwest operates the first run theatres but there is independent subsequent run competition.

"There are five other cities in the states of Kansas and Missouri having a population in excess of 20,000 in which Fox Midwest has no theatre interests.

"Fox Midwest also operates theatres in about 40 communities in this territory which have a population of less than 20,000.

(2909)

"In the Government's Exhibit 371 reference is made to only 13* communities in the states of Kansas, Illinois, Missouri and Iowa which come within this category** in which it is claimed that there are no independent theatres. Each of the other 27 has independent theatres in operation.

"While Fox Midwest has theatre interests in only 40 communities having a population of between 3,800 and 20,000 there are more than 87 other communities in the states of Kansas and Missouri alone which fall within this population range.

"An examination of the historical background of some of the towns in which there are no theatres in

*This figure should be 12. The Government's designation of Fort Madison, Iowa as a town in which there is no independent competition is incorrect. The Iowa theatre (seating capacity 683) in Fort Madison is independently operated by Richard Gaston in competition with the Fox Midwest Strand and Orpheum theatres.

**Exhibit 371 purports to list all towns in the United States under 25,000 population in which there are no independent theatres but those towns listed under the states referred to in the text are all under 20,000.

Rhoden

competition with the Fox Midwest houses discloses that this was precisely the situation as it existed prior to the acquisition by Fox Midwest of any interest in those towns. In other words, the appearance of Fox Midwest on the scene did not, in these situations, diminish or eliminate competition. On the contrary, competition failed to develop in certain towns mainly

(2810)

because their populations were not sufficiently large enough to support a greater number of theatres. On the other hand, there are a number of towns in which there was no competition when Fox Midwest acquired an interest but in which independent competition subsequently developed. Furthermore, in the Kansas City Exchange territory there are a number of towns in which there is no competition within the town itself and in which the theatres are operated entirely by independents.

"There are a number of illustrations of the growth of independent competition in this territory which I could cite. Independent operators have also built up substantial theatre circuits. For example, in the past seven or eight years Mr. Dickinson has succeeded in building up a circuit consisting of 23 theatres located in the Kansas City exchange territory, including Kansas City, Missouri, itself.

"Fox Midwest has not conspired or combined with, and has no agreement or understanding with, any other defendant in this case to restrain interstate trade or commerce or to monopolize or attempt to monopolize interstate trade or commerce in the distribution or exhibition of motion pictures. It has no agreement, express or implied, with any other defendant, relating in any way to the distribution or exhibition of

Ricketson

(2810-A)

motion pictures other than the express license agreements which it has made for the licensing of pictures in its theatres.

"I also deny that Fox Midwest, either individually or in conjunction or combination with any other person, has engaged in any practice which is unfair or discriminatory with respect to any exhibitor with which it competes."

(Sgd) ELMER C. RHODEN.

(2811)

(The affidavit of F. H. RICKETSON, JR. is as follows:)

"IT IS HEREBY STIPULATED by and between counsel for the plaintiff herein and counsel for the defendants, TWENTIETH CENTURY-FOX FILM CORPORATION and NATIONAL THEATRES CORPORATION, that, if called as a witness in this proceeding, F. H. RICKETSON, JR. would testify as follows:

"I am a resident of Denver, Colorado, where I have resided continuously since 1918, except for the period of approximately one year in 1931 and 1932. Since the year 1925, I have been continuously engaged in the motion picture theatre business. From 1935 to date, I have been President and a director of Fox INTER-MOUNTAIN THEATRES, INC., hereinafter referred to as 'FOX INTER-MOUNTAIN', a Delaware corporation, having its principal office and place of business in Denver, Colorado. The defendant, National Theatres Corporation, owns all of the stock of Fox Inter-Mountain.

"Fox Inter-Mountain has an interest, either directly or through subsidiary corporation, in 92

Ricketson

theatres* and 5 dismantled theatre properties located

(2812)

in various cities and towns in the States of Colorado, Idaho, Montana, Nebraska, New Mexico, Wyoming and Utah.

"I am generally familiar with the allegations of the plaintiff in this action.

"ORIGIN OF THE BUSINESS OF FOX INTER-MOUNTAIN PRIOR TO ACQUISITION BY AFFILIATE OF FOX FILM CORPORATION.

"A great many of the theatres now operated by Fox Inter-Mountain were originally part of two separate, independently operated groups of theatres, organized prior to 1929.

"One of the independent groups of theatres was organized and built up by three pioneers in the motion picture business in the Denver Exchange territory, Gus and Max Kohn, and Frank Fairchild. These three men began their theatre activities in 1909 and gradually acquired over the next twenty years a total of approximately 20 theatres located in five towns in Colorado, one in Wyoming and two in New Mexico. In all but one town the theatres operated by these individuals were the only theatre or theatres in the respective communities where they were situated.

"The theatres were operated by the Kohns and Fairchild until August, 1929, when they disposed of

(2813)

their interests to Fox Rocky Mountain Theatre Co., an affiliate of Fox Film Corporation.

*Fox Inter-Mountain is also operating, under temporary arrangements with one exhibitor who is in the armed forces, 4 theatres in Colorado and 2 in New Mexico.

Ricketson

"The other independent circuit was developed by me and my associates between the years 1925 and 1929. Previous to 1925, I had been employed by the Paramount Company, and worked for a time in its distribution department and for a time in its theatre department. After my employment with the Paramount Company ceased, I decided to enter into the theatre business for myself. Together with a partner, A. E. Dickson, I acquired an interest in a theatre located in Montrose, Colorado. During the next few years my associates and I acquired interests in theatres in several other towns in Colorado, Nebraska and Wyoming and by 1929, the theatre business under our management consisted of approximately 25 theatres located in Denver, Boulder, Delta, Montrose, Sterling and Walsenburg, Colorado, Sheridan, Wyoming and in Sidney, Nebraska.

"In all the towns in which I was operating theatres, with the exception of Denver, Colorado, there were no other theatres in these towns besides ours. Many of these communities were relatively small and could not then, nor can they now, support more than one or two theatres.

"In the 1920s there were many important changes
(2814) in the motion picture industry. In that period not only the technique of exhibition was radically changed, but the public was demanding constantly greater service from the exhibitors. Many new theatres were built in Colorado, Wyoming and New Mexico in response to public demands for better theatre accommodations. I and my associates erected new theatre buildings of a modern type in some of the towns in which we were operating. Likewise, producing companies had begun to acquire theatre holdings in this

Ricketson

territory in order to have satisfactory outlets for their product. In the early '20s Universal had theatres in Nebraska as well as one in Denver. Paramount had an interest in theatres in Denver and other Colorado towns which it was using as an outlet for its product. RKO, or as it was known in those days, the Keith-Albee-Orpheum Circuit, was operating a theatre in Denver. In addition, there were several other independent circuits operating in the territory.

"In this same period sound pictures were introduced and exhibitors were faced with new conditions of radical importance. To equip a theatre with facilities for reproducing sound pictures was quite expensive. The cost of operating, and the cost of film, was rapidly increasing.

(2815) "Certain distributors in this period evinced an

an interest in the acquisition of theatres. In August of 1929 negotiations commenced between me and representatives of Fox Rocky Mountain Theatre Co. for the purchase of the theatres in which I had an interest. In the same period representatives of Paramount also made an offer to me, as did certain other exhibitor organizations. I and my associates determined that the offer made by the Fox affiliate was the most desirable from our standpoint and the sale to Fox Rocky Mountain Theatre Co. was concluded in October, 1929.

"At approximately the same time that the above acquisition was made by Fox Rocky Mountain Theatre Co., arrangements were concluded for the purchase of the theatre interests of Kohn and Fairchild, hereinabove referred to, as well as the theatre interests of three other exhibitors in Western Nebraska, which theatres were part of the Denver Exchange ter-

Ricketson

ritory. Likewise acquired were theatres located in Wyoming which had formerly been operated by three other exhibitors. None of the theatre interests so acquired at that time was in competition with each other.

(2816) "After the acquisition of these two groups of theatres by Fox Rocky Mountain Theatre Co., I was employed by that company to supervise the operation of its newly acquired theatres in the territory served by

the Denver offices of the distributors, which I did, and have since, with the exception of a brief period during 1931-1932.

"In 1932, the theatre business felt the full effects of the depression, both nationally and in the rocky mountain states. During that year, Fox Rocky Mountain Theatre Co. sustained large operating deficits, although substantial amounts of additional capital were invested in the operation. Many of its leases and other fixed obligations and commitments became too burdensome to enable it to carry them under existing business conditions. On March 8, 1933, the company was adjudicated a bankrupt in the District Court of the United States for the Western Division of the Western District of Missouri. From that time until its reorganization in 1935, its affairs were conducted by a trustee in bankruptcy. In the ensuing reorganization, which resulted in the formation of the present Fox Inter-Mountain Theatres, Inc., all of the allowed claims were paid and to a large extent the theatres theretofore operated under my supervision have continued as a part of the present Fox Inter-Mountain company.

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**"DESCRIPTION OF PRESENT CORPORATE STRUCTURE
AND GENERAL BUSINESS PRACTICES OF FOX INTER-MOUNTAIN."**

"As previously stated, National Theatres Corporation owns all of the stock of Fox Inter-Mountain. National Theatres Corporation also has a stock interest in various other subsidiaries which are engaged in the motion picture exhibition business in other parts of the United States. Fox Inter-Mountain conducts its business, however, as a separate, local independent company.

"The directors of Fox Inter-Mountain are: F. H. Ricketson, Jr., Arthur H. Bosworth, Henry C. Van Schaack, I. Weiner and Charles P. Skouras. All of these persons reside in Denver, Colorado except Mr. Charles P. Skouras. Henry C. Van Schaack and Arthur H. Bosworth are not officers of Fox Inter-Mountain or officers or directors of National Theatres Corporation. As President of Fox Inter-Mountain, I am in charge of and supervise all of the general policies of its operation. Naturally, on account of its financial interest, National Theatres Corporation exercises a certain amount of direction over matters involving financial commitments of a capital nature, such as new theatre construction, acquisitions, improvements and the rehabilitation of theatre buildings.

"The actual operation of the Fox Inter-Mountain theatres is conducted through Fox Inter-Mountain

(2818)

Amusement Corporation, a wholly-owned subsidiary 'service corporation.' Among the services performed by Fox Inter-Mountain Amusement are: the licensing and booking of films, the necessary purchasing and

Ricketson

maintenance for each theatre, the obtaining and carrying of insurance, and the furnishing of general accounting facilities and other services incident to the operation of the theatres. The service corporation is organized with several departments, each of which performs and is responsible for one or more of the several functions of the corporation. It has a total of 83 persons employed in its various departments in the Denver office of the corporation and a total of 1,251 other employees who manage and maintain the theatres.

"The geographical extent of the area in which Fox Inter-Mountain has theatres has made necessary the operation of the theatres by districts. There are four geographical districts and over each is a district manager. One is the Denver city district; another the northern district, which includes towns in Northern Colorado, Nebraska and Wyoming; the third is the southern district, which includes towns in Southern Colorado and New Mexico; and the fourth is the Montana district, which includes towns in Idaho, Montana and Utah. Each of the district managers, except the district manager of Idaho, Utah and Montana, has his office in Denver. Fox Inter-Mountain maintains

(2819)

a separate office in Salt Lake City, where the manager of this district resides. This district is operated with a greater degree of autonomy than that which exists in the other districts.

"All licenses for motion pictures to be exhibited in Fox Inter-Mountain's theatres located in Colorado, Wyoming, Nebraska and New Mexico are entered into in the Denver Exchange territory. Separate consideration and negotiations are involved with respect to those theatres serviced out of the Salt Lake City Ex-

Ricketson

change territory and separate license agreements, are generally made for these theatres. While the personnel of the film buying department furnishes services in connection with the film licenses for these theatres, as well as those served out of the Denver Exchange territory, the district manager of the theatres in Montana, Utah and Idaho generally participates in negotiations relating to films for these theatres.

"A. Business Practices Relating to the Licensing of Films.

"Fox Inter-Mountain licenses pictures only for those theatres which it operates.

"One of the departments of Fox Inter-Mountain Amusement Corporation is the film buying department, consisting of 9 employees, including buyers,

(2820)

bookers, statisticians and skilled film clerks. The chief function of this department is to negotiate and obtain licenses for the pictures which are to be exhibited in the various theatres of Fox Inter-Mountain and to arrange for the dates on which the pictures are to be shown. All of the personnel of the department must be highly trained and skilled. They must be qualified to appraise the quality of all pictures. They must know thoroughly all of the theatres in which Fox Inter-Mountain has interests and the communities in which such theatres are located. They must have an accurate knowledge of the public taste, and must be able to apply that knowledge with respect to each theatre in the locality where it is situated. Some pictures will inevitably be more popular in one community than they will be in another and the film buying department must decide when film are licensed

Ricketson

which pictures should play in which theatres in every situation in which Fox Inter-Mountain has an interest.

"The product is licensed from the distributing corporations which are parties to the Consent Decree in groups, generally containing five or less pictures, each as offered by the respective distributors. The product of each of the other distributors except United Artists is generally negotiated for and licensed on the basis of the entire season's product.

(2821)

"Prior to the latter half of 1941, almost all of the distributors offered and licensed their entire season's product at one time. National Theatres Corporation then maintained a central office in New York, where negotiations were generally conducted with each of the distributors for the licensing of pictures for theatres in which National was interested. In the latter part of 1941, there was a complete decentralization of National Theatres Corporation's film licensing department. Thereafter, the licensing of films and the negotiations preliminary thereto have assumed a local character.

"In certain instances a distributor may have licensed its product to a subsidiary of National Theatres Corporation other than Fox Inter-Mountain before negotiations between Fox Inter-Mountain and that distributor have been commenced. In such an instance, a general formula may have been worked out between the distributor and the other subsidiary of National, and the formula might relate to the computation of film rental based upon certain percentages applicable to each picture, which percentages would be applicable to the theatres which play the pictures on a percentage basis, rather than a flat rental basis. Subsequently, this formula, worked out and agreed

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upon by another subsidiary of National and a distributor, might be adapted to the theatres of Fox Inter-Mountain or it might suggest a general basis for ne-

(2822)

gotiations. However, Fox Inter-Mountain is not bound to adopt the formula or to follow any other method made by a subsidiary of National other than itself.

"Naturally, there is an exchange of information between the executives of the various subsidiaries of National Theatres Corporation. The information exchanged has to do with all phases of theatre operating business, such as the terms on which films are licensed, the box office possibilities of pictures, and methods and policies applied in the general management and operation of theatres.

"All license agreements which have been negotiated between the representatives of Fox Inter-Mountain and any distributor are either submitted to me for my approval or authority to execute the same must be specifically delegated by me.

"When film licenses are negotiated, each theatre in which Fox Inter-Mountain has an interest is generally given separate consideration and a separate, independent deal is made as to each such theatre.

"Fox Inter-Mountain endeavors to license all worth-while film product produced by all producers, including some which are not defendants in this case—Republic, Monogram, PRC and others. The film licensing procedures used by Fox Inter-Mountain with respect to these other producers are the same used in

(2823)

licensing films from the producers who are defendants in this case.

"There is no standard formula for determining licensing terms for every theatre in which Fox Inter-Mountain has an interest, and there is no standard

Ricketson

formula applicable to each theatre. Licensing agreements for some of the theatres of Fox Inter-Mountain provide for a payment of a specific, fixed amount as film rental. The flat rental to be paid under the license agreement with respect to such theatres inevitably varies with the distributor and with the picture. The film rental for certain pictures might be \$100 and on others it might be \$20. License agreements for other theatres of Fox Inter-Mountain may provide for a determination of film rental on the basis of a percentage of the gross business done by the theatre. As in the case of the flat rental, there is no standard formula for determining the percentage term which is applicable to every theatre or to any one theatre. The methods of determining the rental under these percentage rental terms will vary in many respects depending upon the particular distributor involved. A license agreement with one distributor might provide for a film rental based simply on a certain percentage of the gross receipts. A license agreement with another distributor might provide for what is called a 'sliding scale' arrangement, under which the per-

(2824)

centage of gross receipts which is to be paid as rental will be graduated in accordance with the amount of business done by the theatre on a particular picture.

"All of these various methods by which product is licensed for a theatre on a percentage basis simply represent a means of determining the amount of rental which the exhibitor should fairly pay. The various refinements which sometimes occur in license agreements calling for the payment of rental based on percentages are used solely for the purpose of enabling the distributor to realize a greater amount of return on pictures which are outstanding box office attrac-

Ricketson

tions, and to minimise his return on pictures which are not as popular and make less money than was expected at the time the license agreement was made.

"During the time when negotiations are going on between the representative of Fox Inter-Mountain and the distributor for the licensing of films, the subject of clearance is considered. My attention has been directed to the fact that the history, purpose and effect of clearance generally has been described in other testimony in this proceeding and I will not, therefore, discuss that phase of the matter in this statement.

"I do wish to point out, however, that clearance, while an important part of every film license, is not separately negotiated every time a film license is made.

(2825)

Once a fair and reasonable clearance has been agreed upon between a distributor and an exhibitor, it tends to become fixed and will ordinarily be the same in a series of license agreements in the absence of changed competitive conditions. There are exceptions, however, to this.

"I have been advised by counsel that the Government has made the contention that the distributor and the affiliated theatres agree upon clearances and minimum admission prices for the purpose of fixing the admission price which the exhibitors of subsequent run theatres can charge. This I deny as far as Fox Inter-Mountain is concerned. Where Fox Inter-Mountain has a prior run theatre, I have no interest whatsoever in what the maximum admission price might be at subsequent run theatres of competing exhibitors. In fact, it is preferable from the standpoint of Fox Inter-Mountain, that an admission price be charged at competing subsequent run theatres which, in amount, is as close to what is charged by a prior run

Ricketson

Fox Inter-Mountain theatre as the subsequent run exhibitor believes desirable.

"Therefore, not only have I never entered into any license agreements, contracts, understandings express or implied, with any distributor in an attempt so to fix the maximum admission price of a subsequent run competing theatre, but it simply would not be
(2826)

prudent to do so on my part from a business point of view.

"I desire to emphasize the following facts relating to the licensing of films:

"1. In licensing films for exhibition in Fox Inter-Mountain theatres, the controlling and only consideration is to secure adequate product on fair and desirable terms.

"2. In negotiating for product with any of the distributors who is interested in the operation of theatres, Fox Inter-Mountain and its executives do not and are not concerned with whether Twentieth Century-Fox Film Corporation has licensed its product for exhibition in theatres in which any such distributor has an interest.

"No representative of Twentieth Century-Fox Film Corporation or National Theatres Corporation has ever indicated to me directly or indirectly, that in licensing films from other distributors, consideration should be given by me to whether or not Twentieth Century-Fox Film Corporation has licensed pictures to the theatres operated by such other distributors. For example, when negotiations for pictures are conducted with Warners, Fox Inter-Mountain does not know whether Twentieth Century-Fox has licensed any of its product to Warners for exhibition in the-

Ricketson

atres affiliated with Warners. Moreover, it does not have any knowledge as to whether Twentieth Century-

(2827)

Fox is even negotiating with Warners, or as to whether a license agreement exists with Twentieth Century-Fox for Warners' theatres, or any of the terms of any such license agreement that might exist. If for some reason, Twentieth Century-Fox did not license its product to Warners' theatres, the desire of Fox Inter-Mountain to license Warner product for Fox Inter-Mountain theatres would not be changed. The same would be true in the case of any other distributor.

"Furthermore, I am employed under a contract by Fox Inter-Mountain, the terms of which require that I devote my full attention to the operation of Fox Inter-Mountain theatres in consideration of a fixed salary and a participation in the profits of the Company. I also own stock in National Theatres Corporation. All of my personal interests indicate, therefore, and the fact is, that I am not concerned with the effect which my policies of operation may have upon the distribution of Twentieth Century-Fox pictures in other theatres.

"Twentieth Century-Fox, by reason of its ultimate interest in the operations of Fox Inter-Mountain, as well as other subsidiaries of National Theatres Corporation, naturally offers its pictures to Fox Inter-Mountain for licensing in the Fox Inter-Mountain theatres, and all of such theatres license the product of this distributor. In connection with such licensing, however, there are often protracted negotiations as

(2828)

to the terms which the Fox Inter-Mountain theatres will pay to Twentieth Century-Fox, for Fox Inter-

Ricketson

Mountain and I, individually, have a very definite interest in procuring film service from this distributor on as reasonable terms as is consistent with the quality of its product.

"Furthermore, in view of the relationship referred to above, Fox Inter-Mountain naturally endeavors to give to the pictures of Twentieth Century-Fox, particularly in important first run situations, the best possible exploitation and treatment consistent with good exhibition policies.

"FOX INTER-MOUNTAIN THEATRES AND THE COMPETITIVE SITUATION IN THE COMMUNITIES WHEREIN THEY ARE LOCATED.

"A. Denver, Colorado

"The population of Denver in 1930 was 287,861 and by 1940 it had increased to 322,412. The estimated population of Denver in 1945 is 450,000, or more than 100,000 greater than it was in 1940. This is the only city having a population in excess of 100,000 in which Fox Inter-Mountain operates theatres.

"Denver has been the center of great war-time activity and, as indicated by the figures referred to above, there has been a great influx of population since 1942.

(2829)

"There are 38 theatres in Denver. Fox Inter-Mountain has an interest in 12.

"(1) First Run Theatres

"There are four large theatres operating on a first run policy in downtown Denver. Two of them are operated by Fox Inter-Mountain, one by RKO (in which operation I am informed Loew's also has an

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interest) and one operated by an independent exhibitor. The latter two theatres are in direct and vigorous competition with the theatres of Fox Inter-Mountain. There follows a description of the theatres and the product licensed by them.

"The Denver theatre (2510 seats) is operated by Fox Inter-Mountain. It was constructed in 1927 by an affiliate of Paramount. Paramount's interest in this theatre was terminated in the bankruptcy of that company in 1932, and since that time Paramount has not had any interest in it. The Denver theatre is located in the heart of the downtown theatre section of Denver. It is a fine, up-to-date de luxe theatre, and, in my opinion, because of its location and modern conveniences, provides the best first run outlet for product in the city.

"The Paramount theatre (2,096 seats) is also one of Denver's finest theatres. It is located directly across the street from the Denver and was constructed in 1931. It is modern, commodious, up-to-date in

(2830)

every respect and can likewise be considered one of the de luxe theatres of this section of the country. It, too, was originally constructed by an affiliate of Paramount, but the interest of that company was also terminated in the Paramount bankruptcy.

"The product of Twentieth Century-Fox, Warner Bros., Universal, United Artists and Columbia is licensed for first run exhibition in these theatres. It should be noted that for a period prior to 1937 these theatres were operated by an independent exhibitor and during such operation substantially the same product now being exhibited first run in the theatres was licensed to this independent operator. The product licensed to these two theatres would, in my opinion,

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be offered to them, regardless of affiliation, because they have the potential ability to pay the highest film rental and to afford to a distributor the best in the exploitation of its product.

"The RKO theatre, the Orpheum (seating capacity 2,596) is the largest theatre in Denver. It, too, is a fine de luxe theatre, having been constructed in 1931 by an affiliate of RKO. Originally it operated for a short while with a policy of vaudeville and first run pictures, but for the last ten years has operated substantially exclusively on a motion picture policy. This theatre has for a number of years been operated ex-

(2831) clusively as a first run theatre and at the present time regularly exhibits first run product of RKO and Loew's.

"The Denham theatre (1,392 seats) is operated by an independent exhibitor, Mr. Dave Cockrill. While it does not have as large a seating capacity and is not as well located as the other downtown first run theatres, it is, nevertheless, well suited for first run exhibition and has all of the customary facilities and equipment of a first run house. The Denham regularly licenses the product distributed by Paramount and has done so for a long period of time.

"The three interests operating these four theatres compete with each other in every possible way consistent with fair business practices. No agreement or understanding of any kind exists between them with respect to the operation of their first run theatres.

"Fox Inter-Mountain is also interested in the Telenews theatre in downtown Denver, which theatre, however, exhibits only newsreels and short subjects. The product exhibited in the Fox Inter-Mountain

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theatres in downtown Denver is also exhibited day and date in two other theatres operated by Fox Inter-Mountain, namely, the Esquire (742 seats) and the Webber (732 seats). This policy of day and date operation in these theatres was inaugurated during

(2832)

the war. The downtown theatres referred to above had been particularly congested with patronage, largely of a transient nature, partly by reason of excursions into Denver made by the many members of the Armed Services from nearby military camps and stations. Theatre accommodations were crowded, and transportation facilities were overburdened. For the purpose of relieving this situation the policy referred to above was adopted.

"The Aladdin theatre (1,376 seats) and the Rialto theatre (878 seats) are also operated by Fox Inter-Mountain theatres and are operated as moveover theatres. They charge the same admission price as the downtown theatres, but exhibit on such policy only the product exhibited in the Fox Inter-Mountain downtown first run theatres.

"(2) Subsequent Run Theatres

"There are 29 subsequent run theatres in Denver. Five of these are operated by Fox Inter-Mountain. The others are operated by independent exhibitors. With respect to three of the Fox Inter-Mountain theatres, independently operated theatres in competition with them regularly exhibit product on the same or on a prior run. All of these subsequent run theatres are in competition with each other, as well as with the first run theatres.

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*"B. Communities With A
Population Less Than 100,000*

"Fox Inter-Mountain has no theatre interests in any of the cities of Colorado, Idaho, Montana, Nebraska, New Mexico, Utah and Wyoming having a population of over 50,000 but under 100,000.

"Fox Inter-Mountain is interested in the operation of theatres in three out of a total of eight cities in these states which have a population of from 25,000 to 50,000. It also operates theatres in thirteen cities out of a total of thirty-one located in the seven above states with populations ranging from 10,000 to 25,000. In the approximately 395 communities in these states having a population of less than 10,000, but more than 1,000, Fox Inter-Mountain has theatre interests in only eighteen*.

"Colorado

"There are two cities in Colorado with a population of more than 20,000 but less than 55,000. Fox Inter-Mountain has no interest in theatres in either city. Five cities have a population ranging from 10,000 to 20,000. Fox Inter-Mountain has a theatre interest

(2834)

in three of these, Boulder, Fort Collins and Trinidad.

"Fox Inter-Mountain operates the only theatres regularly operated in Boulder and in Fort Collins. In Trinidad, Fox Inter-Mountain has two theatres; one operates on a first run policy, the other on combined first and second run. There are two other the-

*Fox Inter-Mountain also operates theatres in three other towns of this population category but only on a temporary basis while the regular exhibitor is in the military service.

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atres in Trinidad operated by independent exhibitors on a second and third run policy in competition with the Fox Inter-Mountain theatres.

"Colorado has 73 towns with a population under 10,000; but over 1,000. Fox Inter-Mountain has an interest in theatres in eight* of these towns. As indicated in the Government Exhibit No. 371 in this case, Fox Inter-Mountain operates all of the theatres in Dela, Durango, Leadville, Longmont, Sterling and Walsenburg. In 50 other towns in Colorado with a population under 10,000 but over 1,000, one exhibitor other than Fox Inter-Mountain, operates the only theatre or theatres.

"Idaho

"Idaho has seven towns with populations of from 10,000 to 26,000. Fox Inter-Mountain has an interest (2835)

in three of these towns, Pocatello, Idaho Falls and Nampa. In Pocatello and Idaho Falls, the Fox Inter-Mountain theatres are operated in competition with the theatres of other exhibitors. In Nampa, Fox Inter-Mountain operates the only two theatres. Prior to the time when the theatres in Nampa were acquired by Fox Inter-Mountain, there were only two theatres in that community. The situation has remained unchanged.

"Fox Inter-Mountain has a theatre interest in one out of forty-five Idaho towns having a population under 10,000, but over 1,000. The three Fox Inter-Mountain theatres in this town, Caldwell, were acquired in 1937, two from the same exhibitor who had

*Fox Inter-Mountain operates theatres in two other towns of this category, but only on a temporary basis while the regular exhibitor is in military service.

Ricketson

previously operated the theatres with first and second run product. Idaho has twenty-nine other towns of less than 10,000 but more than 1,000 population in the Salt Lake City Exchange territory where one exhibitor operates the only theatre or theatres in the town.

"MONTANA

"Montana has two cities, Butte and Great Falls, of over 25,000 but under 50,000 population. In Butte, Fox Inter-Mountain theatres are operated in competition with the theatres of an independent exhibitor in both first and second runs. In Great Falls, Fox (2836.)

Inter-Mountain operates the first run theatres. There is subsequent run independent competition.

"Montana has four cities with a population of from 10,000 to 25,000, Anaconda, Billings, Helena and Missoula. Fox Inter-Mountain operates all of the theatres located in Billings, Helena and Missoula.

"Fox Inter-Mountain operates theatres in only one of forty-seven towns of Montana with a population under 10,000, but over 1,000, namely; Lewistown, where it operates all of the theatres. There are thirty-five other towns in Montana in the Salt Lake City Exchange territory of less than 10,000 but more than 1,000 population where the only theatre or theatres are operated by one exhibitor.

"NEW MEXICO

"Fox Inter-Mountain operates no theatres in any of the New Mexico cities having a population of over 10,000.

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"Fox Inter-Mountain operates theatres in two* out of the forty-one towns in New Mexico having a population under 10,000, but over 1,000. As appears from Government Exhibit No. 371, Fox Inter-Moun-

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tain operates all of the theatres in these two towns, Las Cruces and in Las Vegas. The independent exhibitor from whom the theatres were acquired by Fox Inter-Mountain in each instance operated these theatres without competition. New Mexico has twenty-two other towns in the Denver Exchange territory of less than 10,000 but more than 1,000 population where one exhibitor operates the only theatre or theatres in the town.

"NEBRASKA

"Nebraska has two important cities, Omaha and Lincoln. Fox Inter-Mountain has no interest in any theatres in either.

"In the seven~cities with a population of from 10,000 to 20,000, Fox Inter-Mountain has theatre interests in one town, North Platte. Here, the Fox Inter-Mountain theatres are operated in competition with the theatres of an independent exhibitor.

"There are 100 towns in Nebraska with a population under 10,000 but more than 1,000. Fox Inter-Mountain has interests in three of these communities, and, in each instance, the Fox Inter-Mountain theatres are the only theatres in the town. Further, in each instance, the Fox Inter-Mountain theatres were operated without competition by the exhibitor from

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whom the theatres were acquired. Nebraska has thir-

*Fox Inter-Mountain operates theatres in one other town of this category but only on a temporary basis while the regular exhibitor is in the military service.

Ricketson

teen other towns in the Denver Exchange territory of a population of less than 10,000 but more than 1,000 where one exhibitor operates the only theatre or theatres in the town.

"UTAH

"Fox Inter-Mountain Theatres operates two theatres in only one city in Utah, namely Ogden, which had a population in 1940 of 43,688. These theatres are operated in competition with theatres operated by an affiliate of Paramount.

"WYOMING

"Wyoming has four cities with a population from 10,000 to 25,000. Fox Inter-Mountain operates in three of these, Cheyenne, Rock Springs and Laramie, and in these three communities there are no other theatres, as appears from the Government's Exhibit 371.

"Wyoming has twenty-seven communities under 10,000 but more than 1,000 population. Fox Inter-Mountain operates in only four of these, and in these four communities there are no other theatres. Wyoming has twenty-three other towns between 1,000 and 10,000 population where one exhibitor, other than Fox Inter-Mountain, operates the only theatre or theatres.

"With respect to the foregoing general description

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of the competitive situation in the territory in which Fox Inter-Mountain operates, it should be noted that the territory comprises many sparsely settled sections in which small communities are separated from each other by wide distances. In many of these communities, as I have previously indicated, there is only one theatre and in others in which there are two theatres in existence only one is in operation. Because of

Ricketson

their size and because of economic conditions existing in them, it is not feasible to operate more than one theatre.

"As indicating that it is inherent in the nature of the business in these smaller communities than only one theatre can be operated, or that where there are more, they are operated by a single exhibitor, I have referred in the discussion of the competitive situation of Fox Inter-Mountain to the large number of communities in this territory in which all the theatre operations are conducted by a single, independent operator.

"In all of the communities in which it operates, competitively or otherwise, the theatres of Fox Inter-Mountain provide adequate and suitable accommodations for the public at fair admission prices; its theatres are well operated and well-maintained. In all

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competitive situations its theatres are either better than, or comparable with, competing theatres.

"Fox Inter-Mountain has not conspired or combined with, and has no agreement or understanding with any other defendant in this case to restrain interstate trade or commerce or to monopolize or attempt to monopolize interstate trade or commerce in the distribution or exhibition of motion pictures. It has no agreement, express or implied, with any other defendant, relating in any way to the distribution or exhibition of motion pictures other than the express license agreements which it has made for the licensing of pictures in its theatres.

"I also deny that Fox Inter-Mountain, either individually or in conjunction or combination with any other person, has engaged in any practice which is unfair or discriminatory with respect to any exhibitor with which it competes."

(Sgd) F. H. RICKETSON, JR.

Charles P. Skouras

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(The affidavit of Charles P. Skouras is as follows:)

IT IS HEREBY STIPULATED by and between counsel for the plaintiff herein and counsel for the defendants, Twentieth Century-Fox Film Corporation and National Theatres Corporation, that if called as a witness in this proceeding Charles P. Skouras would testify as follows:

My address is 1609 West Washington Boulevard, Los Angeles, California. I am the president of National Theatres Corporation, one of the defendants in this case. I have held that office since April of 1942.

The directors of National Theatres Corporation are: Spyros P. Skouras, Charles P. Skouras, H. C. Cox, J. R. Dillon, E. G. Hines, Dan Michalove, W. C. Michel, Otto E. Koegel and Donald A. Henderson.

I am also the president of Fox West Coast Theatres Corporation (a wholly owned subsidiary of National Theatres Corporation), having held that office since its organization in the spring of 1933.

The directors of Fox West Coast Theatres Corporation, all of whom are residents of Los Angeles County, California, are as follows: Charles P. Skouras, John B. Bertero, George Topper, George Bowser, T. H. Sword and H. C. Cox.

I have been engaged in the theatre exhibition business continuously since 1912. I first became asso-

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ciated with National Theatres Corporation in January of 1932. At that time it was known as Wesco Corporation and was a wholly owned subsidiary of Fox Film Corporation, and I was employed to act as one

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of the managers of the theatres in which it was interested.

DESCRIPTION OF NATIONAL THEATRES CORPORATION.

National Theatres Corporation is a holding corporation which itself does not operate theatres, but which owns the stock of other corporations which operate approximately 600 theatres, either directly or through subsidiaries, in the continental United States. Approximately 98% of the stock of National Theatres Corporation is owned by the defendant Twentieth Century-Fox Film Corporation. National Theatres Corporation now has five principal domestic subsidiaries. Each of these subsidiaries conducts its affairs independently of the others. Each has its principal office in the area in which it operates. Each has its separate president and operating head who has authority to direct and supervise its theatre operations and those of its subsidiaries. These five principal subsidiaries are as follows:

1. Fox West Coast Theatres Corporation, which, directly or through its subsidiaries (in a few of which

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it owns only an indirect minority interest) operates or supervises the operations of approximately 265 theatres in California and Arizona. It has its principal office in Los Angeles and a subsidiary office in San Francisco. I am the president and chief executive of this company. (For convenience, Fox West Coast Theatres Corporation is hereinafter referred to as "Fox West Coast" and any theatre in which it has an interest, direct or indirect, and which is supervised by it or a subsidiary, is hereinafter referred to as a "Fox West Coast theatre.")

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2. Evergreen State Amusement Corporation, 53.58% of the stock of which is owned by National Theatres Corporation, is interested in approximately 44 theatres in Washington and Oregon and has its principal offices in Seattle, Washington. The principal minority stockholders, Messrs. Frank L. Newman, Sr. (president of the company), Al Rosenberg and Al Finke, are the operating heads of this company.

3. Fox Inter-Mountain Theatres, Inc., is interested in approximately 100 theatres in Wyoming, Colorado, Utah, New Mexico, Idaho, Montana and Nebraska. It has its principal offices in Denver, Colorado, and a subsidiary office at Salt Lake, Utah. F. H. Ricketson, Jr. is the president and operating head of this company.

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4. Fox Midwest Theatres, Inc. is interested in approximately 128 theatres in Missouri, Kansas, Illinois, Nebraska and Iowa and has its principal offices in Kansas City, Missouri. Elmer C. Rhoden is the president and operating head of this company.

5. Fox Wisconsin Theatres, Inc. is interested in approximately 66 theatres in Wisconsin and the upper peninsula of Michigan, and has its principal offices in Milwaukee, Wisconsin. Harold J. Fitzgerald is the president and principal operating head of this company.

National Theatres Corporation (which up to November 1934 was known as Wesco Corporation) acquired its interests in these five principal subsidiaries in connection with the reorganizations through bankruptcy proceedings of certain theatre operating com-

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panies which were already established in their respective areas. Substantially all of the stock of these predecessor companies had been owned, directly or indirectly, by National Theatres Corporation prior to their bankruptcies.

National Theatres Corporation through National Theatres Amusement Co. Inc., its wholly owned service company, furnishes advice on financial, tax and fiscal matters but does not exercise any immediate supervision or control over the operation of the theatres of

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these five principal subsidiary corporations. Theatre policies, admission prices, methods of operation and the transaction of all matters pertaining to their operations are determined upon and conducted separately by the management of each.

National is consulted with respect to the financial advisability of the leasing, construction, improvements, acquisition of new theatres and commitments involving substantial obligations or expenditures. However, the respective executive officers of these five principal subsidiaries have complete authority, subject, of course, to the approval of their respective boards of directors, to enter into all contracts and commitments relating to the operations of the theatres operated by the companies they head, particularly with respect to film license agreements. Each of these five subsidiaries has its own film licensing departments. National Theatres Amusement Co. Inc. has one employee whose function it is to furnish advice and service to the film buyers for each of these five principal subsidiaries. None of such film licensing agreements are subject to National's approval, and none of them are ever submitted to it for approval.

While there is a continual exchange of information between the chief executive officers of the five prin-

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principal subsidiaries concerning all matters of common interest and pertaining to the exhibition business of (2846)

these companies, including film license terms, nevertheless complete authority with respect to film licensing agreements rests with the chief executive officer of the respective subsidiaries.

Prior to the latter part of 1941 National Theatres Corporation, through a subsidiary company, did maintain a film licensing department in New York which conducted negotiations for film licenses on behalf of all of these subsidiaries, but since that time this practice has been abandoned. The film licensing has been decentralized and placed in the hands of the local companies at their respective offices.

FOX WEST COAST THEATRES CORPORATION

The remainder of this statement will be devoted to a discussion of the history, operating policies, practices and competitive situations of Fox West Coast Theatres Corporation.

History of Fox West Coast Theatres Corporation

The predecessor of Fox West Coast Theatres Corporation, namely, West Coast Theatres, Inc., was incorporated under the laws of California in December 1920, and was organized by four partners to take over the operation of nineteen theatres located in five cities

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in California, namely, Los Angeles, Venice, Pomona, Bakersfield and Taft. Prior to incorporation the business had been carried on by a partnership known originally as Gore Bros. & Lesser. In August of 1920 a new partner was taken in, Mr. Adolph Ramish, and

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the name of the partnership was changed to Gore Bros., Lesser & Ramish.

"About two years after its organization the new company acquired from two pioneer exhibitors, Turner and Dahnken, about 16 theatres located in the principal cities of Northern California such as Oakland, Berkeley, Richmond, San Jose, Watsonville, Fresno and Salinas, and at about the same time acquired from them and their partner Langley about 16 theatres in Southern California, which, with the exception of three theatres in Riverside, were all located in the Los Angeles Metropolitan Area. By 1925 the new company had an interest in approximately 85 motion picture theatres and was operating in many of the important cities in California. In that year, 1925, the company floated a bond issue and secured funds to construct a group of de luxe neighborhood theatres which, for the most part, were located in the Los Angeles Metropolitan Area. Thus, the Fox West Coast circuit was, to a great extent, built up under the management of the Gore Bros., Lesser and Ramish.

(2848) "In about 1926 Ramish sold his one-third interest

to Fox Film Corporation. In about January 1927 the Gore brothers and Lesser sold their two-thirds interest to National Theatres Corporation which had been organized by Hayden Stone & Co. for the purpose of acquiring this interest in the West Coast circuit.

"In about April 1928 Fox Film Corporation acquired all the stock of National Theatres Corporation and thus secured a 100% interest in West Coast Theatres, Inc.

"Fox West Coast Theatres was adjudicated a bankrupt in the District Court of the United States

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for the Southern District of California, Central Division, on February 28, 1933. On April 4, 1933, William H. Moore, Jr., Charles C. Irwin (who had no connections with the motion picture industry) and I were elected trustees of the estate of the bankrupt and we served in such capacities throughout the administration of the estate. The circuit was operated by the trustees from February of 1933 until February 2, 1935, at which time the assets of the bankrupt estate, consisting principally of the newly organized Fox West Coast Theatres Corporation, were purchased by National Theatres Corporation.

"Description of Fox West Coast Organization.

"The theatres of the various subsidiaries and affili-

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ates of Fox West Coast Theatres Corporation are operated through a subsidiary corporation called Fox West Coast Agency Corporation. The agency corporation maintains executive and accounting offices in Los Angeles, as well as executive offices in San Francisco. It has a large maintenance and repair division constantly at work keeping these theatres in first-class condition. It employs a group of experienced theatre operators to act in an executive capacity as district managers of the theatres in various administrative districts. It also employs a staff of experienced film buyers and bookers to license the pictures which are to be exhibited, in the theatres it services, to arrange proper programs and playing dates and to see that the films are at the theatres at the proper dates. The agency corporation maintains two screening rooms, one in Los Angeles and one in San Francisco, where the film buyers, bookers, district managers and publicity department can screen pictures in

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order to determine, from a 'box office' point of view, their quality and suitability for exhibition in the various theatres, the combinations of pictures that should be put together on double bills, and the type of publicity and exploitation that is likely to be most productive in securing good patronage at the theatres.

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"Licensing of Motion Pictures.

"Fox West Coast Agency Corporation has two experienced film buyers who are in charge of more than thirty employees in the film buying, booking and statistical department. These men are charged with the responsibility of seeing that suitable pictures are continuously available for exhibition in the theatres at film rentals which the theatres can afford to pay and still operate at a profit.

"Films are licensed from distributors upon a wide variety of terms. These terms vary extensively from distributor to distributor and often from picture to picture. Most of these variations arise for the fact that it is very difficult to determine in advance a picture's exhibition value, so that these men are continually negotiating with representatives of the distributors to arrive at fair film license payments. All of these various formulae are designed to correlate the price of the picture with the exhibition quality of the film. Such correlation would be relatively simply in theatres playing a single feature program because it could then be based directly upon the gross receipts of the theatre. However, when a theatre is using double features or accompanying the pictures with

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stage shows there is always room for argument as to how much of the business is dependent upon any par-

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ticular feature. As a result, license fees and their methods of determination vary greatly from distributor to distributor and from picture to picture. Some pictures are purchased from some distributors upon a 'flat rental' i.e., a fixed number of dollars for the right to show a picture for a certain length of time. Others are based upon a percentage of gross receipts, others upon a combination of the two systems, such as a percentage of gross receipts with a maximum or minimum figure or a percentage which will vary on reaching certain agreed upon maximum or minimum figures. The formulae referred to are not all inclusive and there are other bases which develop in the bargaining between distributor and exhibitor.

"The Fox West Coast film buyers operate under my direct supervision, and on some occasions, particularly where large film rentals are involved, I participate in the film licensing negotiations myself. Film License agreements negotiated by the Fox West Coast film buying department are signed by it and, as stated above, are not submitted to or approved by National or its board of directors. Likewise, licenses made with distributors, other than Twentieth Century-Fox, are never submitted to or approved by that company. In

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no instance is there any correlation between film license payments made by Fox West Coast and whether the distributor receiving those payments is interested in theatres. In no case is there any consideration given by Fox West Coast in the licensing of film from any distributor, with or without theatre affiliations, to the distribution problems of Twentieth Century-Fox Film Corporation, and Fox West Coast has not concerned itself or been influenced by the status of any negotiations or the effect of any license

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agreements between Twentieth Century-Fox Film Corporation and any other affiliated exhibitor.

"I have an employment contract with National Theatres Corporation calling for my employment as the chief executive officer of that corporation for a period expiring December 25, 1954. Under this contract a very substantial part of my compensation is based upon the profits of National Theatres Corporation; and I therefore have a large personal interest in the successful operations of National Theatre Corporation and its subsidiaries. Except for 300 shares of common stock owned by me and members of my immediate family I have no interest in the profits of Twentieth Century-Fox Film Corporation. I have no interest in the profits of any other defendant in this action. I and my immediate family hold 25 shares of the Class B stock of National Theatres Corporation.

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Each share of this stock receives the same dividend payable with respect to each share of Class A and is convertible into the Ordinary Class A stock. According to my information the remaining 15 outstanding shares of the Class B Stock are owned by the presidents of three of the other principal operating subsidiaries of National Theatres Corporation, namely, Messrs. Rhoden, Ricketson, Fitzgerald, or by members of their respective families. These 40 shares are convertible in the aggregate into twenty per cent of the equity stock of National Theatres Corporation. Hence, it would not benefit me or the other owners of the Class B shares to deviate from sound exhibition policies to assist the distribution department of Twentieth Century-Fox pictures. I do not do so and I have never been asked to do so.

"Our affiliation with Twentieth Century-Fox Film Corporation has never been of any significance in enabling us to negotiate more favorably than we could

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otherwise do with any other producer or distributor of motion pictures. The ability of Fox West Coast to license the product for exhibition in its theatres is based primarily upon its successful exhibition in the past of pictures of the distributor in question; upon the fact that its theatres are designed and, accustomed to furnish the best accommodations to the public and the best outlet for the distributors' product on the

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runs on which they are licensed; and upon its reputation for efficient management and the consistent payment of fair film rentals. Affiliation with Twentieth Century-Fox Film Corporation does not assist or hamper Fox West Coast in any way in its negotiations for the pictures of other distributors; and in licensing pictures for exhibition in its theatres, Fox West Coast has never taken into account or considered, or been asked to take into account or consider, the effect of such licenses, or the terms thereof, upon the relations of Twentieth Century-Fox Film Corporation with the other defendants in this action.

"The variations in customer relationship in the various towns where Fox West Coast operates show that there is no relationship between the product exhibited by Fox West Coast and whether or not the distributors thereof are affiliated with theatre operators. Reference will later be made to specific situations which show that both Fox West Coast and its competitors exhibit the pictures of distributors, with and without theatre affiliations, on various 'run' sequences; in some instances the competitor having the first run and Fox West Coast having the subsequent run of the same picture, and in other cases the reverse being true.

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"Run and Clearance.

An integral part of the negotiations of film licenses is the determination of what run the theatre licensing the picture will have, how long it will have to wait after the picture is released before it can play the picture, and how soon the picture will become available to other competing theatres. However, once a theatre has licensed a run which proves to be profitable, it is usually to its best interests to endeavor to continue to license pictures on the same run unless the competitive situation changes considerably. It is also usually to the best interests of the theatre to secure substantially the same run from all of its suppliers, for it is hard to get a theatre's regular customers used to a variable playing policy. Consequently, Fox West Coast usually negotiates and endeavors to contract for substantially the same run of the pictures of the same distributors for which it has been contracting.

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"Moreover, once the distributor has established a satisfactory customer relationship with a theatre, the distributor will desire to continue substantially the same relationship. Unless the theatre of its established customer has become obsolete or its location has become unsuitable, or for some reason its ability to pay satisfactory film rentals has become impaired, the

distributor ordinarily does not change customers. The result of these economic considerations is that so long as the distributor has a satisfactory customer and the customer has sufficient pictures of box-office value at prices which he can afford to pay, an established distributor-customer relationship usually continues to remain fairly static.

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"In negotiating for a particular run an exhibitor will also negotiate with the distributor for clearance to protect what he is contracting for, that is, the right in his competitive area to exhibit the picture at a certain time prior to the time that some competitor is privileged under his license agreement to exhibit the same picture. The clearance which the prior run exhibitor is granted by the distributor over the subsequent run exhibitor is dependent upon a number of factors having an economic bearing upon the extent of the competition between the two theatres, such as location, seating capacity and admission price. Once the clearance is granted to the prior run exhibitor over his competitor it usually remains constant so long as the economic factors upon which the clearance is based do not change, for in the absence of such change it is obvious that the extent of competition remains about the same.

"In licensing films from distributors Fox West
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Coast has never entered into any agreement or understanding with any distributor relating to clearance which had as its purpose any improper subordination of a subsequent run licensed to an independent exhibitor. It is only interested in securing from a distributor such proper clearance as the distributor is willing to grant to it. Furthermore, distributors with theatre affiliations and distributors without such affiliations grant to the prior run theatres of independent theatre operators the same clearances they grant to the prior run theatres of Fox West Coast in comparable situations and, conversely, the subsequent run theatres of Fox West Coast are subject to the same clearances as are the subsequent run theatres of independent theatre operators in comparable situations.

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"Admission Prices.

"Fox West Coast has not entered into any agreement, plan or arrangement with any distributor to establish or fix the admission prices of any competing theatre. The admission prices charged in the Fox West Coast theatres are not determined for the purpose of fixing or affecting admission prices charged by its competitors, but are fixed in reference to the economic factors operating only upon its own theatres, including the price the public is willing to pay

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to see the picture, the type and location of the theatre, the service provided, and the economic influence of the admission prices being charged by competitors.

"Fox West Coast and, so far as I know, no distributor or competing exhibitor is concerned with what increases in admission prices an exhibitor may make over and above the minimum prices which he represented he would charge at the time he licensed pictures. The higher the admission price charged by a subsequent run, the less effect does it have on the prior run patronage. Consequently in situations where Fox West Coast has a prior run it would manifestly not be to its interest to limit in any way the right of the subsequent run to raise its admission price and it has never done so. In some instances Fox West Coast has found that, in some of its better theatres, it can secure higher admission prices than competitors playing similar runs, and sometimes even higher than competitors with earlier runs.

"It is only necessary to examine competitive admission prices to see there are no established scales or systems. For example, in the Los Angeles area all

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of the first run theatres operated by Fox West Coast are charging an 85¢ admission price, while most of the first run theatres operated by others whether affiliated or non-affiliated are charging an 80¢ admission price. (2859)

A 60¢ admission price is charged in most of the Fox West Coast first neighborhood run theatres, although some charge a 55¢ admission price. Some of the similar first run neighborhood theatres operated by non-affiliated exhibitors also charge 60¢; others charge 55¢ and still others, in some suburban areas, charge 44¢ although exhibiting pictures at approximately the same time.

"If the comparison is carried down to the later subsequent runs the variations are even greater. For example in the area surrounding Westlake Park in the central part of Los Angeles, Fox West Coast's first neighborhood run charges a 60¢ admission price, and the unaffiliated second, third and fourth runs charge 44¢, 40¢ and 36¢ respectively. In the area immediately north of this Westlake Park area the independent first run charges 55¢, the second run 50¢, the third run 42¢, and the fourth run 25¢.

"In the area immediately west of this group the Fox West Coast first and second run charge 55¢. The other runs are operated by unaffiliated exhibitors at the following admission prices: the third run charges 50¢, the fourth run 35¢, the two fifth runs 40¢, the sixth run 35¢ and the last run 40¢.

"Relationship of Fox West Coast with Other Defendants.

"Fox West Coast leases two theatres from Loew's. (2860) It has an agreement with Paramount, providing for

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the leasing of three theatres in San Francisco under arrangements whereby the latter participates in the profits from the operation of these three theatres and three other theatres in the same locality. These are the only instances in which any distributor, other than Twentieth Century-Fox Film Corporation, has any interest in theatres operated by Fox West Coast.

"LOEW'S"

"The State Theatre, Los Angeles, and the Warfield Theatre, San Francisco, were leased by affiliates of Loew's in 1923 to a corporation owned jointly by Loew's and West Coast Theatres, Inc. In the early '30s this arrangement was terminated, and the two theatres were leased directly to Fox West Coast at reduced fixed rentals. Loew's only present interest in these theatres is that of a landlord entitled to receive a fixed monthly rental, commensurate with the true rental value of the theatres. For several years many outstanding pictures of Loew's have been given, and are now being given, their first run exhibition in the Los Angeles theatre, Los Angeles, in which Loew's has no interest whatever. In San Francisco many of the outstanding pictures of Loew's are exhibited first run in the Fox Theatre in which Loew's also has no in-

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terest whatever.

"PARAMOUNT"

"In 1930 Paramount Public Corporation, or an affiliate, was the operator of the State (formerly known as the California) theatre and the St. Francis theatre, in San Francisco, California. It also then had under construction a new theatre, the Paramount.

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Under date of December 10, 1930, Paramount Publix Corporation and Fox Film Corporation entered into an agreement whereunder the former agreed to cause its appropriate affiliate to lease these three theatres to Fox West Coast at annual fixed rentals aggregating \$450,000. As additional rental Fox West Coast was to pay to the landlord affiliate of Paramount 35% of the earnings of Fox West Coast from its first run operations in the cities of San Francisco, Portland and Seattle* in excess of its earnings from such operations for each preceding fiscal year commencing with the fiscal year 1931. None of the leases relating to the State, St. Francis or Paramount required to be executed under the terms of said agreement of December 10, 1930, were actually executed by Fox West Coast or any of its subsidiaries. In October, 1932, both Fox

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West Coast and Fox Film Corporation disclaimed any liability to Paramount arising out of or under the agreement of December 10, 1930, and each of them refused to make any further payments to Paramount, asserting, among other things that Paramount had committed certain violations of the agreement.

"On March 14, 1933, Paramount was adjudicated a bankrupt by the United States District Court for the Southern District of New York, and Charles D. Hilles, Eugene W. Leake and Charles E. Richardson were duly elected its trustees in bankruptcy. These trustees filed large claims against the estate of Fox West Coast Theatres, a bankrupt, and threatened legal proceedings against Fox Film Corporation. Protracted negotiations concerning the respective claims

*As part of the same transactions, provisions were made for the leasing of a Paramount theatre in Seattle and one in Portland at separately specified rentals. These leases have since expired.

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of the parties took place between the trustees of Paramount, and trustees of Fox West Coast and representatives of Fox Film Corporation. These negotiations culminated in the execution of the agreement dated as of January 25, 1934 between the said Paramount trustees, Fox Film Corporation and Fox West Coast Theatres Corporation (Exhibit 232). This agreement of January 25, 1934, provided that it should not become effective until it was approved by the bankruptcy court having jurisdiction of the Paramount

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bankruptcy and by the court having jurisdiction of the Fox West Coast bankruptcy. This agreement was approved by both bankruptcy courts and became fully effective. Under the terms of this agreement, the appropriate Paramount affiliates agreed to and did lease the Paramount, St. Francis and State theatres to Fox West Coast at average fixed annual rentals aggregating \$228,000 (that is, approximately \$220,000 less than provided for in the December 10, 1930 agreement) plus 37½% of the net earnings from the operation of all theatres operated by Fox West Coast in downtown San Francisco. At the time of the execution of the agreement the only other theatres operated by Fox West Coast in downtown San Francisco were the Embassy, the operations of which were unprofitable, and the Warfield, which had made a profit of approximately \$22,000 for the year 1933. The Fox theatre in downtown San Francisco was acquired in 1936 and the United Nations theatre was acquired in 1943.

"In short, the present arrangements under which Paramount participates in the profits from the operation of these Fox West Coast theatres in downtown San Francisco stem from an agreement which was en-

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tered into by Fox West Coast because, as was aptly put by its trustees in their petition for approval of the (2863-A)

January 23, 1934 agreement 'by the terms thereof there will be withdrawn claims asserted against said estate in the aggregate face amount of \$10,818,754.31 some of which are duplications and/or amendments) . . . 'and 'said rentals are at a figure which will permit said theatres to be operated at a substantial profit in the opinion of your petitioners . . . '.

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RELATIONSHIP OF FOX WEST COAST
WITH UNITED ARTISTS THEATRE CIRCUIT, INC.

"My attention has been directed to the claim of the Government that United Artists Theatre Circuit, Inc., which is not a defendant in this case, should, however, be considered as an affiliate of Twentieth Century-Fox Film Corporation; and in this connection reference has been made to the fact that Fox West Coast and United Artists Theatre Circuit, Inc. are interested in the operation of certain theatres in California.

"The only situations in which there is any connection between Fox West Coast and United Artists Theatre Circuit, Inc. are with reference to United West Coast Theatres Corporation, a company in which they are both stockholders and with reference to the United Artists and Four Star Theatres in Los Angeles, which are operated by Fox West Coast in conjunction with the State and Chinese theatres for the joint interest of Fox West Coast and United Artists Theatre Circuit.

"Prior to September of 1931 United Artists Theatres of California, Ltd. (a subsidiary of United

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Artists Theatre Circuit, Inc., which I understand is not a producer or distributor of motion pictures) had acquired or constructed a group of 11 theatres located in several California communities. At that time it

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entered into agreements with Fox West Coast providing for the operation of these theatres, and certain Fox West Coast theatres in the same areas, by a new corporation called West Coast United Theatres Corporation. 75% of the stock of the new corporation was owned by Fox West Coast and 25% by United Artists Theatres of California, Ltd. This contract was made before I first became associated with Fox West Coast or National Theatres Corporation, before Mr. J. Schenck became associated with Twentieth Century-Fox Film Corporation, and before Skouras Theatres Corporation was organized. All of the theatres of the new corporation were operated by Fox West Coast's service corporation.

"When Fox West Coast Theatres went into bankruptcy in the spring of 1933 the United Artists Theatres of California, Ltd. terminated the leases of its theatres to West Coast United. The trustees in bankruptcy of Fox West Coast Theatres immediately opened negotiations with United Artists Theatres of California, Ltd. to reinstate the leases of these pictures. In September of 1933 a new agreement was entered into between Fox West Coast Theatres Corporation and United Artists Theatres of California, Ltd. and this new agreement was approved by the Bankruptcy Court having jurisdiction of the Fox West Coast bankruptcy. It provided for the organization of a new company to be known as the United

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West Coast Theatres Corporation. 70% of the stock of the company was to be and is owned by Fox West

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Coast and 30% by United Artists Theatres of California, Ltd. There were leased to the new company substantially the same theatres that had formerly been leased to West Coast United. The theatres so leased to the new company are managed by Fox West Coast's service corporation. No executive of United Artists Theatre Circuit, Inc. or any of its subsidiaries is connected with the management of Fox West Coast or its service corporation, Fox West Coast Agency Corporation. The position of United Artists Theatre Circuit, Inc. in this situation is solely that of a minority stockholder having no direct voice in the operating policies of the theatres.

"Fox West Coast and United Artists Theatre Circuit, Inc. are also interested in the operations of five other theatres in Los Angeles. Arrangements with respect to these theatres are reflected in an agreement dated September 20, 1937. This agreement represents the extension (with some modification) of an original arrangement entered into in 1934, at a time when the affairs of Fox West Coast were being administered by its trustees in bankruptcy. At that time (as well as at present) Fox West Coast and United Artists Theatre Circuit, Inc. were each stockholders in the

(2867)

company, which owns the Chinese theatre in Hollywood. Prior to 1934 and at the time of its bankruptcy on February 27, 1933 Fox West Coast had a twenty-five year lease on the Chinese theatre which was terminable as a result of its bankruptcy. In 1932 the Chinese theatre had lost more than \$100,000 and the theatre did not operate during a substantial part of the year 1933. The bonds of the landlord corporation, in which Fox West Coast owned and still owns a $\frac{1}{3}$ interest, were in default. It had filed proceedings under Section 77B of the Bankruptcy Act and there

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was a possibility of complete loss of this property and the wiping out of the respective interests of Fox West Coast and of United Artists Theatres Circuit, Inc.

"United Artists Theatre Circuit, Inc., or a subsidiary thereof, was the lessee of the downtown United Artists Theatre which, as I recall, was also closed in 1933 during the time the Chinese was closed. Fox West Coast's 25-year lease of the Chinese had been extinguished and in order to continue the company's interest in the operation of that theatre and to save its investment in the property, Fox West Coast made arrangements with the other shareholder, United Artists, for Fox West Coast to operate the Chinese and United Artists theatres together with the State Theatre under an agreement whereby each would receive

(2868)

50% of the profits from the operation of those theatres. The Four Star Theatre in the Wilshire Boulevard district was already leased to United West Coast Theatres Corporation and provision was made that it might from time to time be included in the first run operating arrangement. At about the same time, in order to preserve the Fox West Coast investment in the Chinese, I made arrangements with several distributors for simultaneous first run exhibition at the State Theatre in downtown Los Angeles and the Chinese Theatre in Hollywood (which I will refer to in detail later) and under this arrangement pictures with the greatest box office appeal were given simultaneous showings while the United Artists Theatre afford an additional first-run outlet for pictures not suitable for such simultaneous exhibition. Except for the United Artists Theatre, United Artists Theatre Circuit, Inc. was not engaged in theatre operations in this area and had no suitable organization

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or other facilities for operating its sole theatre; and hence it was desirous that Fox West Coast take over the management of the theatre. Accordingly, the original arrangement referred to above was effected under which United Artists Theatre Circuit, Inc. and Fox West Coast were each to receive 50% of the profits resulting from the combined operations of the four theatres referred to.

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"With respect to the operations of these theatres, the same situation exists as in the case of the theatres leased to United West Coast Theatres Corporation. They are managed and operated by Fox West Coast Agency Corporation and United Artists does not control or participate in such management and operation.

"Cities Where Local Monopolies Are Alleged

"The Government has charged Fox West Coast Theatres Corporation with maintaining local theatre exhibition monopolies in six cities with a population of 100,000 or over: Los Angeles, Long Beach, San Diego, San Francisco, Oakland and Sacramento. In all of these cities there are not only a substantial number of competing subsequent run theatres, but there are competing first run theatres operated by persons not affiliated with any motion picture distributor or producer. To demonstrate these facts I have considered in detail the competitive situation in each of these cities.

A.

*"Cities Of Over 100,000 Population
Los Angeles*

"The principal city in which Fox West Coast Theatres Corporation operates is Los Angeles, California.

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There are approximately 222 theatres in the City of Los Angeles and 58 of them are operated by Fox West Coast.

"Description of Los Angeles"

"The population of Los Angeles in 1920 was 576,673; in 1930 it was 1,238,048; and in 1940 it was 1,504,277. The 1943 population of Los Angeles has been estimated at 1,775,000. The old downtown shopping and business section is about six blocks long and four blocks wide, with its center along Broadway between Third and Ninth Avenue.

"Since about 1920 there has been a second downtown shopping area in the part of greater Los Angeles known as Hollywood, which is located about seven miles to the northwest of the old downtown Los Angeles section. Although it is within the City of Los Angeles it is in fact a separate community with its own main street along Hollywood Boulevard and its own shopping and amusement area.

"Los Angeles grew to its present size during the era of automobile transportation. The result is that it has no adequate public transportation system and residents of Los Angeles expect to travel from one part of the city to another in their own automobiles. As a result, the two downtown shopping areas in Hollywood and along Broadway have become very congested and they do not afford adequate parking

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space for all the people who would normally desire to shop there. This has led to the development of a new shopping area along Wilshire Boulevard, south of Hollywood and west of downtown Los Angeles. This new shopping area runs from just east of Ver-

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mont Avenue to Beverly Hills, so that it is about eight miles in length and only a few blocks wide. This area is not heavily built up like the downtown and Hollywood shopping areas, but it contains the largest and finest department stores in the City of Los Angeles. These stores are located from one to several blocks apart and are surrounded by large parking lots, so that prospective shoppers can drive to the stores in their automobiles and find convenient parking space right at the store. Within the last ten years this area has developed to such an extent that it really amounts to a third downtown section, or a third city within the Los Angeles metropolitan area. A new large shopping area is now developing in the southwest section of the city. The large department stores, most of which have already opened stores in two or more of the other three areas, are now acquiring additional sites in southwest Los Angeles. This illustrates the rapid decentralization trend of merchandising in the Los Angeles metropolitan area.

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"Description of First Run Exhibition in Los Angeles.

"When I joined Fox West Coast in 1932, it was already operating what I consider to be two of the finest theatres in southern California, namely, Grauman's Chinese theatre in Hollywood (2,048 seats) and State theatres (2,404 seats) in downtown Los Angeles. The Chinese was then the most famous theatre in the world. It had an international reputation for gala premieres of the finest pictures. The State is a big de luxe house located the corner of Broadway and Seventh, the busiest corner in Los Angeles. I consider that the finest theatre location in the city. Prior to the depression the Chinese had operated on a road

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show policy, playing long runs at advanced admission prices, usually \$1.50. In the early '30s Fox West Coast was unable to acquire suitable pictures to continue this policy, and the theatre was closed.

"I negotiated with Fox Film Corporation and Loew's, Inc. to license their pictures for simultaneous first run exhibition at the State and Grauman's Chinese theatres, and thus simultaneous first run exhibition in downtown Los Angeles and Hollywood was inaugurated.

"When the success of this type of simultaneous first run showings became apparent, other first run

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exhibitors over a period of time also adopted similar practices so that now RKO, Warners, Paramount and Blumenfeld all offer simultaneous first run facilities in downtown Los Angeles and Hollywood, competing with the first run theatres operated by Fox West Coast.

"As I have already indicated, in the late '30s and early '40s another major shopping area developed along Wilshire Boulevard in central Los Angeles. This area includes most of the better residential section of Los Angeles. Following the trend of merchandising in metropolitan Los Angeles, I negotiated with the distributors to license the Ritz, in central Los Angeles, for similar simultaneous first run exhibition. This also proved successful and Warners and Mr. Blumenfeld have opened first run theatres in this area, competing with the Fox West Coast first run houses.

"At the present time there are thus three areas in metropolitan Los Angeles which are treated for motion picture exhibition purposes as separate communities with separate first run theatres.

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"(a) *Downtown Los Angeles*

"In the downtown Los Angeles section there are 9 first run theatres. Their operators, seating capacities and adult evening general admission prices are as (2874)

follows:

<i>Theatre</i>	<i>Operator</i>	<i>Seats</i>	<i>Run</i>	<i>Admission Price</i>
State	FWC	2,404	1	85¢
Los Angeles	"	1,980	1	85¢
United Artists	"	2,100	1	85¢
Hillstreet	RKO-Pantages	2,916	1	80¢
Warners	Warners	2,500	1	80¢
Paramount	Fanchon & Marco-Paramount	3,347	1	80¢
Music Hall	Blumenfeld	902	1	80¢
California	Frank Fouce	1,900	1-Spanish	60¢
Orpheum	FWC	2,207	1,2	98¢ to Vaudeville \$1.20

"Fox West Coast's Theatres:

"The State theatre, one of the finest, has the best location of any theatre in Los Angeles. It is now exhibiting first run most of the pictures distributed by Twentieth Century-Fox and some of the pictures distributed by Loew's, RKO, Columbia, Universal, Republic and International Pictures, and Selznick International pictures which are distributed by United Artists. The Los Angeles theatre, another fine house, is excellently located about one-half block from the State. It is now exhibiting first run most of the pictures distributed by Loew's. The United Artists theatre is also a deluxe 'show case' type theatre and ex-

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(2875)

hibits other pictures of the same distributors who license product to the State and Los Angeles and also some of the pictures distributed by Monogram and PRC.

"Competitive First Run Theatres:

"The Paramount, Warners, Hillstreet and Orpheum theatres are large deluxe theatres about equally suitable for first run exhibition. They are the finest houses in downtown Los Angeles except for the State, Los Angeles and United Artists. All these theatres are within a block or two of the center of the shopping district. The Paramount theatre exhibits Paramount pictures and some of the pictures distributed by Republic. The Warner theatre exhibits Warner pictures. The Hillstreet exhibits pictures distributed by Universal, Columbia and RKO, including pictures produced by Goldwyn, Walt Disney Productions and International Pictures. The Orpheum specializes in vaudeville and usually shows a single first run feature distributed by Monogram, Republic, or PRC. The Music Hall, while well located, is a long narrow theatre which does not have the same deluxe appearance or size as the others. It is now showing exclusively the first run of United Artists product. The California theatre is an older, poorly located house. It shows Spanish language pictures exclusively.

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"(b) Hollywood

"In Hollywood there are 8 first run theatres. Their operators, seating capacities, and adult evening general admission prices are as follows:

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Theatre	Operator	Seats	Run	Admission Price
Chinese	FWC	2,028	1	85¢
Egyptian	"	1,535	1	85¢
Guild	"	968	1	85¢
Paramount	Fanchon & Marco-Paramount	1,500	1	80¢
Pantages	RKO-Pantages	2,812	1	80¢
Warners	Warners	2,756	1	80¢
Music Hall	Blumenfeld	500	1	80¢
Hawaii Music Hall	Blumenfeld	1,000	1	80¢

"In Hollywood the product of the various distributors is licensed to the same operators of these first run houses as in downtown Los Angeles, except that the pictures exhibited first run with vaudeville at the Orpheum usually do not receive a first run in Hollywood but are sometimes played first run at the Vogue. The Chinese usually plays the same pictures as the State, the Egyptian the same as the Los Angeles, the Guild the same as the United Artists, Warner's Hollywood the same as Warner's Downtown, the Paramount in Hollywood the same as the Downtown

(2877)

Paramount, the Pantages the same as the Hillstreet and the Hollywood and Hawaii Music Hall's the same as the Downtown Music Hall.

"The Chinese, Warner's Hollywood, Pantages and Egyptian are large deluxe theatres constructed for first run exhibition. The Hollywood Paramount and the Guild were constructed as legitimate theatres and they have been recently converted into motion picture houses. They are now good first run theatres, but not quite comparable to the other four. The Hollywood Music Hall and Vogue are well located and

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have good appointments, but they are not large enough to provide as suitable first run facilities as the other first run houses. The Hawaii Music Hall is located the eastern end of Hollywood Boulevard, outside of the downtown Hollywood area.

"(c) Wilshire District

"In the Wilshire district there are now 7 first run theatres. Their operators, seating capacities, and adult evening general admission prices are as follows:

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Theatre	Operator	Seats	Run	Admission Price
Ritz	FWC	1,402	1	85¢
Carthay				
Circle	"	1,518	1 & M.O.	85¢
Four Star	"	900	1 & M.O.	85¢
Fox Wilshire	"	2,296	1	85¢
Beverly Music				
Hall	Blumenfeld	850	1	80¢
Wiltern	Warners	2,000	1	80¢
Uptown	FWC	1,800	1	85¢

"Pictures which receive their first Los Angeles runs in theatres operated by RKO and Paramount do not receive a first Los Angeles run in the Wilshire district. The other theatres play a first run of the same product which their operators are showing first run in Hollywood and downtown Los Angeles.

"With the exception of the big de luxe Fox Wilshire, these theatres are slightly smaller in size than most of the first run houses in Hollywood and downtown Los Angeles. Otherwise, they are comparable to the first run theatres in the other two areas. The Four Star and the Beverly Music are small de luxe

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theatres like the Vogue and Hollywood Music Hall, while the others are large, fine theatres. The Carthay Circle, Fox Wilshire, Uptown and Wiltern were constructed for first run operation; the Ritz was con-

(2879)

structed as a de luxe neighborhood theatre and has been converted to first run since the outbreak of the war.

*"Description of Subsequent Run.
Exhibition in Los Angeles*

"In Los Angeles neighborhood areas the first exhibition occurs 21 days after first run Los Angeles closing whether the first runs are affiliated or non-affiliated and whether the first subsequent runs are affiliated or non-affiliated. There are about 23 different Los Angeles neighborhoods each with theatres playing a 'first' subsequent run. Thirteen of these first subsequent runs are operated by Fox West Coast; 9 are operated by non-affiliated exhibitors; and in one area a first subsequent run theatre is operated by Fox West Coast and one is also being operated by Warner Bros. All of these first subsequent run theatres exhibit substantially all the better pictures distributed in Los Angeles, whether they have their first run in affiliated or non-affiliated theatres, and whether or not they are distributed by distributors who own theatres or distributors who do not own theatres. The second subsequent runs in each of these neighborhoods usually play 7 days after the first runs, the third play 7 days after the second, etc., and the

(2880)

distributors all license second, third, etc., subsequent runs in each neighborhood.

"There are approximately 185 of these neighborhood subsequent run theatres of which Fox West

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Coast operates 32 (14 of which are 'first subsequent' run in their respective areas), unaffiliated theatre exhibitors operate 153, and Warner Bros. operate one. 18 of the 32 subsequent run theatres of Fox West Coast are operated second, third or fourth subsequent run.

"In Los Angeles the Fox West Coast subsequent run theatres exhibit not only the pictures of distributors which license first run to it but also the pictures of distributors which license first run to its competitors.

"San Diego, California

"San Diego had a 1930 population of 147,795, a 1940 population of 203,341 and an estimated 1943 population of 390,000. In San Diego there are 31 theatres. Fourteen of these are operated by companies affiliated with Fox West Coast Theatres Corporation. Seven San Diego theatres are playing first run and 5 of these 7 are affiliated with Fox West Coast. Three other theatres are playing a continued first run or

(2881)

moveover policy. Two of these are operated by Fox West Coast. Outside the City of San Diego but in the San Diego metropolitan area, there are 6 additional theatres, none of which are operated by Fox West Coast.

"There are two first run operators in San Diego, Fox West Coast and Gus Metzger. Mr. Metzger is not affiliated with any motion picture distributor or producer. He operates the first run Broadway (800 seats), Tower (600 seats) and Spreckles (1,800 seats) theatres, using all of the product of Universal and Columbia and about one-half of the Warner product. The product of Fox, Metro, Paramount, RKO and the

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balance of Warner's is shown at Fox West Coast's first run theatres: The Fox (2,878 seats), the California (2,027 seats), the State (1,012 seats), the Adams (684 seats), the Loma (1,184 seats). All of the first run and moveover theatres in San Diego are in competition with each other.

"The Fox theatre is one of the largest and finest theatres on the Pacific Coast. The California, Orpheum, State and Spreckles are de luxe first run theatres. The Broadway, Tower and Adams are small theatres with excellent appointments. The Loma was erected within the last year. It is a good sized, de luxe, modern theatre and one of the best in town.

(2882)

"For subsequent run purposes San Diego is divided into three neighborhoods. The subsequent runs in each neighborhood have substantially the same availability as similar runs in the other neighborhoods. Fox West Coast plays the second, third and fourth runs in the downtown area and in the North Park area, playing both the pictures it has exhibited first run and those its competitor has exhibited first run. Non-affiliated theatres play similar runs in the South San Diego area. The first run theatres, both affiliated and non-affiliated, have the same clearance of 35 days over the theatres in the neighborhood areas. The non-affiliated subsequent run theatres, in the suburbs, such as Oceanside, La Mesa, La Jolla, Linda Vista, Ocean Beach, Coronado and National City, play earlier than the subsequent run Fox West Coast theatres in the San Diego subsequent run areas.

"Long Beach, California

"The population of Long Beach in 1930 was 142,032; in 1940, 164,271. The Rand McNally 1945

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Atlas estimates the Long Beach population for 1943 at 225,000. There are 20 motion picture theatres in Long Beach, 4 of which are operated as first runs and 3 of which are operated on a continued first run or moveover policy. Fox West Coast operates 7 theatres (2883)

in Long Beach, 2 of which are first runs (West Coast, 2,072 seats, and United Artists, 1,242 seats) and 2 of which are moveovers (Long Beach, 1,164 seats, and Imperial, 856 seats). Of the other three theatres of Fox West Coast, one operates second run, one fourth run and one is a newsreel house.

"Cabart Theatres Corporation (under the management of Milton Arthur and not, so far as I know, affiliated in any way with any distributor) operates 5 theatres in Long Beach, 2 of which are first run (State, 1,356 seats, and Cabart, 950 seats) and one of which is a moveover (Rivoli, 1,100 seats). Cabart generally plays first run of the product of RKO, Columbia, one-half of Warner's and one-half of Universal. The product of the other defendant distributors usually plays first run at the Fox West Coast theatres.

"All of the early run theatres in Long Beach are well operated first class houses suitable for first run operation and there is active competition between the respective operators.

"First run theatres in Long Beach, both affiliated and non-affiliated, take 35 days clearance over Fox West Coast's second run Egyptian (1,080 seats) theatre and the subsequent run theatres customarily take (2884)

7 days clearance over the next subsequent run. Fox West Coast's two subsequent run theatres, the second run Egyptian and fourth run Belmont (842 seats), play pictures which are played first run by Fox West

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Coast and also those that are played first run by its competitors.

"San Francisco, California.

"San Francisco had a 1930 population of 634,394 and a 1940 population of 634,536. Because of war activity on the Pacific Coast, the city has had a very large transient population during the last several years. There are 82 theatres in San Francisco, 8 of which are operated by Fox West Coast. 10 San Francisco theatres are presently operating on a first run policy with the product of the distributor defendants. 5 of these theatres are operated by Fox West Coast; 1 is operated by RKO; and 4 are operated by J Blumenfeld. These theatres are all in the same competitive area and there is active competition between their respective operators.

"All of these theatres are large houses with de luxe appointments. The Fox, with 4,651 seats, is the largest and finest theatre in the West.

(2885)

"At the present time, these first run theatres are playing the product of the various distributors as follows: The Golden Gate theatre (2,825 seats), operated by RKO, is playing RKO product; the Orpheum (2,900 seats), Esquire (975 seats), United Artists (1,200 seats) and Tivoli (1,400 seats), all operated by Mr. Blumenfeld, are playing United Artists, Columbia, Universal, PRC and one-half of Monogram product.

"The product of Twentieth Century-Fox, Loew's, Paramount, Warners, Republic and about one-half of Monogram is exhibited first at theatres operated by Fox West Coast: the Fox (4,651 seats), the Paramount (2,646 seats), the Warfield (2,656 seats), the St. Francis (1,455 seats) and the State (2,133 seats).

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"Fox West Coast has only three other theatres in the City of San Francisco. One of these, the United Nations (1,149 seats) is a downtown theatre operating on a second run policy. The other two, El Capitán (2,574 seats) and the Rialto (1,530 seats) are large, fine neighborhood theatres which operate on a second run policy.

"The clearance granted to Fox West Coast's first run theatres over subsequent runs is no greater than that accorded to the competitive theatres operated by the Independent exhibitor, and the Fox West Coast
(2886)

second run plays no earlier than the non-affiliated second run.

"Oakland, California

"Oakland had a 1930 population of 284,063 and a 1940 population of 302,163. It is located directly across San Francisco Bay from the City of San Francisco and is located in the San Francisco metropolitan area. There are 38 theatres in Oakland, 8 of which are operated by Fox West Coast Theatres.

"There are 8 Oakland theatres which are operated first run, of which 5 are operated by Fox West Coast. All of these theatres are in the same competitive area, and their respective operators are in active competition with each other. They are as follows:

"The Fox (3,335 seats); Paramount (3,434 seats) and Orpheum (2,561 seats), operated by Fox West Coast, represent very large investments and are fine theatres with excellent locations in downtown Oakland. They are particularly desirable for first run exhibition and are undoubtedly the superior houses of the city. They are now exhibiting first run the pro-

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ducts distributed by Twentieth Century-Fox, Loew's, Paramount, RKO and about one-half of the product distributed by Warner Bros. Fox West Coast's Grand Lake theatre (2,177 seats), located about a mile and a half out of the downtown section in one of the better

(2887)

residential sections, and Fox West Coast's Franklin theatre (836 seats), a downtown house, are operating on continued first run policies showing the pictures of these same distributors.

"Mr. Blumenfeld, the same exhibitor who has been referred to in connection with Los Angeles and San Francisco, operates the T & D theatre (2,760 seats) which is almost as large as Fox West Coast's first run theatres, but it is older, not so well equipped, and located a few blocks out of the better downtown amusement section. He also operates the Roxy (1,080 seats) and Esquire (1,370 seats). His theatres exhibit the first run product distributed by Columbia, Universal, PRC and approximately one-half of the pictures distributed by Warner Bros.

"Fox West Coast operates only three other theatres in Oakland. Two of these theatres, the State (1,524 seats) and the Senator (1,624 seats), operate on a second run policy. They are large de luxe neighborhood theatres comparable to or better than any other neighborhood theatre in the area. The third theatre, the Tower (600 seats), operates on a fourth run policy.

"In Oakland the subsequent run theatres of Fox West Coast exhibit not only the pictures of distributors which license first runs to it but also the pictures of those distributors which license their pictures

(2888)

first run to the competitors of Fox West Coast.

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"Cities With Population of 50,000 to 100,000"

"The Government has charged Fox West Coast Theatres Corporation with maintaining a theatre exhibition monopoly in six cities with a population between 50,000 and 100,000: Phoenix, Arizona; and Berkeley, Stockton, San Jose, Pasadena and Santa Monica, California. In all of these cities except San Jose and Pasadena there are competing first run theatre operators. I shall consider each of these cities in detail and indicate the competitive situation.

"Berkeley, California"

"Berkeley had a 1930 population of 82,109 and a 1940 population of 85,547. Berkeley is part of the San Francisco metropolitan area. It is located across San Francisco Bay from the City of San Francisco about 8 miles to the northeast. It is immediately north of Oakland and geographically it constitutes the northern part of Oakland. There are 10 motion picture theatres in Berkeley, 4 of which are operated by Fox West Coast Theatres. There are 3 theatres in Berkeley now generally playing on first run policies. Two of these theatres are operated by Fox West Coast and

(2889)

one by J. Blumenfeld. All of these theatres are in the general competitive area and their respective operators are all in competition with each other.

"At the present time, the Berkeley theatre (1,400 seats), operated by Mr. Blumenfeld, is showing first run in Berkeley the product of the following distributors: Columbia, Universal, PRC and approximately one-half the product of United Artists. The pictures distributed by Twentieth Century-Fox, Loew's, Para-

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mount, Warner's, RKO, Monogram, Republic and approximately one-half of United Artists are shown first run at the United Artists (1,642 seats) and Campus (1,191 seats) theatres of Fox West Coast.

"The United Artists, Campus, Berkeley, UC (1,498 seats) and California (1,410 seats) are all located a few blocks from each other in the principal downtown business district of Berkeley and they are all in the immediate vicinity of the campus of the University of California. In addition to these downtown theatres, there are 5 theatres in the suburbs of Berkeley, located in varying directions from one to three miles from the downtown area.

"All first run theatres of Fox West Coast and of (2890)

Blumenfeld take the same clearance over second run theatres of Fox West Coast and of Blumenfeld. Fox West Coast's fourth run UC theatre plays the product of the distributors whose pictures are shown first run at the Fox West Coast theatre as well as those whose pictures are shown first run by its competitor. Fox West Coast's second run California theatre shows some of the pictures which were exhibited first run by its competitor, and the balance of the pictures shown first run by Fox West Coast's competitor are also shown second run by that same competitor.

"The United Artists theatre is the largest, finest and best appointed house in Berkeley. The California, UC and Berkeley are large de luxe theatres.

"Sacramento, California"

"Sacramento, the capital of California, had a 1930 population of 93,750 and a 1940 population of 105,958. There are 18 theatres in Sacramento and one in North Sacramento. Fox West Coast operates, or is

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interested in the operation of, only 5 of these theatres. Of the 5 first run theatres in Sacramento, Fox West Coast is interested in the operation of 3 and Mr. Blumenfeld operates 2. Mr. Blumenfeld also has an additional theatre, which operates first run a sub-
(2891) ,

stantial portion of the time.

"The Senator theatre has 2,100 seats and is the finest theatre in the Sacramento Valley. The Alhambra theatre is a 2,000 seat de luxe neighborhood theatre. Blumenfeld's best first run theatre is his 1,100 seat new neighborhood Tower theatre. His downtown Esquire and Times theatres have only 998 seats and 500 seats, respectively.

"Mr. Blumenfeld exhibits the first run product of Columbia, Universal, PRC and approximately one-half of Warners, while Fox West Coast exhibits the first run of the other defendant distributors.

"There is active competition between the first run theatres operated by Blumenfeld and Fox West Coast in Sacramento. Fox West Coast's second run Hippodrome (1,769 seats) and third run Rio (1,292 seats) show the pictures having their first run in their competitor's theatres as well as those having their first run in theatres in which Fox West Coast is interested.

"Stockton, California

"Stockton had a 1930 population of 47,963 and a 1940 population of 54,714. There are 9 theatres in Stockton, 4 of which are operated by Fox West Coast. There are 3 first run theatres in Stockton, 2 operated

•(2892)

by Fox West Coast and one by Mr. Blumenfeld. The operators of these theatres are in active competition with each other.

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"The Sierra theatre (615 seats) operated by Mr. Blumenfeld is exhibiting first run Columbia, Universal, PRC and about one-half of United Artists. Fox West Coast is exhibiting first run one-half of the United Artists pictures and all the product of the other defendant distributors. It also exhibits second and fourth run the product of all the defendant distributors including those having their first run in theatres operated by their competitors.

"Fox West Coast's first run California theatre has 2,170 seats. This is much the finest theatre in town, Fox West Coast's new Ritz theatre, with 926 seats, is also a suitable first run theatre. The subsequent run, State theatre, operated by Fox West Coast, has 1,500 seats and the non-affiliated, third run Stockton theatre 1,000 seats.

"Fresno, California

"Fresno had a 1930 population of 52,513 and a 1940 population of 60,685. There are 10 theatres in Fresno, 4 of which are operated by Fox West Coast and one of which is operated by Warner Bros. Two of the Fox West Coast theatres play first run, the

(2893)

Warners theatre plays first run, and Gerald Hardy's theatre, the Hardy, also plays some first runs.

"These theatres are all in the same competitive area and are in active competition. At its Wilson (1,897 seats) and Tower (930 seats) theatres Fox West Coast is playing the first run of the product distributed by Twentieth Century-Fox, Metro, Paramount, United Artists, PRC and three-fourths of RKO. The Warner theatre (2,173 seats) is playing the first run of Warners, Columbia, Universal, Republic and one-fourth of RKO. The Hardy theatre (1,336 seats) is

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playing the first run of Monogram and the second runs of Republic and Universal.

"Fox West Coast's second run Kinema (1,282 seats) and third run State (1,279 seats) play second and third run pictures of all the defendant distributors, including those pictures which have had their first run at the theatres operated by its competitors.

"San Jose, California

"The population of San Jose in 1930 was 57,561 and in 1940, 68,457. There are 9 theatres in San Jose and 3 additional theatres in the suburbs. Fox West Coast operates 3 theatres in San Jose: the California (1,748 seats), Mission (1,178 seats) and Padre (998 seats). These theatres all operate on a (2894)

first run policy, showing the pictures of all the defendant distributors. The California is the largest and finest theatre in town. The Mission is a good sized comparable house and the Padre a smaller de luxe theatre.

"Turner and Dahnken, Inc., acquired by Fox West Coast in 1923, operated first run a group of theatres in a number of cities in Northern California, and were exhibiting pictures first run at the Mission theatre in San Jose at the time their interests were acquired by Fox West Coast. The California was built in about 1925. The Padre was acquired in about 1936.

"Pasadena, California

"Pasadena had a 1930 population of 76,086 and a 1940 population of 81,864. Pasadena is a fashionable residential suburb of Los Angeles located about 10 miles northeast of downtown Los Angeles. It grew to substantially its present size in the 1920s, so that, in

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comparison with other similar cities in the Los Angeles metropolitan area, its growth since 1930 has been comparatively slight. There have been no new theatres built in Pasadena since 1931.

(2895) "There are 11 theatres in Pasadena. Fox West Coast operates three of these theatres, the Academy (1,673 seats), United Artists (912 seats) and Pasa-

dena (894 seats) on a first run policy. It operates two, the Tower (745 seats) and Uptown (910 seats) on a moveover or continued first run. All of these theatres are well maintained modern houses. The United Artists is the newest theatre in the city. Fox West Coast spent over \$100,000 in the early '40s rehabilitating the Academy and Uptown theatres. The first run theatres are wholly adequate to serve the first run needs of both the distributors and the public. Their admission prices are no higher than those charged in other comparable situations like Long Beach and Santa Monica where Fox West Coast has first run competitors. Fox West Coast also operates four subsequent run theatres and there are two independent subsequent run theatres. All these Pasadena theatres compete with the theatres in the neighboring suburbs of Los Angeles, such as Eagle Rock, High Park, Alhambra, El Sereno and San Gabriel.

(2896) "At the time of the acquisition by Fox Film Corporation of its interest in Fox West Coast, the latter was operating five theatres in Pasadena which had been constructed or acquired during the regime of the Gore Bros., Lesser, and Ramish.

"Santa Monica, California.

"The population of Santa Monica in 1930 was 37,146 and in 1940, 53,500. Santa Monica is a suburb

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of Los Angeles, located directly west of Beverly Hills and that part of Los Angeles known as Westwood. It is about 13 miles from downtown Los Angeles. It borders on the Pacific Ocean and, together with Venice, the suburb directly south of Santa Monica, constitutes the principal beach area for Metropolitan Los Angeles, as well as being a residential suburb.

"At the place where Santa Monica and Venice meet, there is quite an extensive amusement park, known as Ocean Park. There are 2 theatres in Ocean Park, one being on the Santa Monica side of the boundary line and the other on the Venice side. Ocean Park has always been treated for motion picture exhibition purposes as a separate community. The first runs in Ocean Park play seven days after first run Los Angeles and the first runs in Santa Monica play seven days after first run Ocean Park.

"There are 7 theatres in Santa Monica proper, 3 of them being operated by Fox Coast and 4 by operators not affiliated with any motion picture distributor. Three of these theatres operate on a first run

(2897)

policy. The non-affiliated Hitching Post (360 seats) plays western and action pictures distributed by Republic, Columbia, Universal, Monogram and PRC. The non-affiliated Majestic (647 seats) plays pictures distributed by Warners, Columbia, Universal, Monogram and PRC and approximately one-half the pictures distributed by United Artists. The Fox West Coast's Criterion (1,200 seats), which is the finest, largest and best located theatre in the city, plays pictures distributed by Loew's, Twentieth Century-Fox, Paramount and RKO and one-half the pictures distributed by United Artists. Substantially all these pictures play second run at the non-affiliated El Miro

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(887 seats), third run at Fox West Coast's Wilshire theatre (1189 seats), fourth run at the non-affiliated Aero (650 seats) and last run or as revivals at Fox West Coast's Bundy theatre. The Bundy, a new, modern theatre with 912 seats, represents a substantial investment. The Hitching Post and Aero are smaller, inferior theatres.

"The operators of these theatres are all in active competition." Both Fox West Coast's third-run Wilshire theatre and its last run Bundy, as well as the non-affiliated second run El Miro theatre, play the pictures of those distributors whose pictures are exhibited first run by Fox West Coast and those whose

(2898)

pictures are exhibited first run by its non-affiliated competitors.

"Phoenix, Arizona"

"Phoenix had a 1930 population of 48,118 and a 1940 population of 65,414. There are 11 theatres in Phoenix, 2 of which are operated by Fox West Coast, 6 of which are operated by an affiliate of Paramount and 3 of which are operated by persons having no affiliation with any motion picture distributor. Three of these theatres operate on first run policies, 2 others as moveovers or continued first runs and 2 others on mixed policies, partly first and partly subsequent run.

"The largest and finest theatre in Phoenix is the Fox theatre (1,796 seats), operated on a first run policy by Fox West Coast and showing first run pictures distributed by Twentieth Century-Fox and United Artists, some of the pictures distributed by Republic and PRC and about one-half the pictures distributed by Warner Brothers, RKO and Universal. Fox West Coast's new Vista theatre (730 seats) oper-

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ates on a moveover policy, showing substantially the same pictures as the Fox on a continued first run. It opened in September, 1944, inaugurating the continued first run of these pictures and, thus, playing

(2899)

prior to Paramount's second and third runs. The Orpheum theatre (1,590 seats), operated by Paramount, shows first run pictures distributed by Paramount, Loew's, Columbia and about one-half the pictures distributed by Warner's, RKO and Universal. The Azteca theatre (950 seats), operated by an independent, shows first run of Spanish and Mexican pictures. The Phoenix theatre (755 seats), operated by another independent, shows first runs of Monogram and some other Western pictures, together with fourth and fifth runs of Paramount, Loew's, Twentieth Century-Fox and Warner Bros. The Rex (400 seats), operated by the same man who operates the Azteca, shows first run Western pictures and last runs of other pictures. All these theatres are in competition.

"C.

*"Cities With Populations
Between 25,000 and 50,000*

"There are 12 cities in the State of California with populations between 25,000 and 50,000. I understand that the Government charges that in 8 of these cities theatre exhibition is dominated by exhibitors affiliated with motion picture distributors. The following analysis of the theatre situation in those 8 towns will demonstrate that this charge is without substance or

(2900)

significance.

"*Alhambra.* Alhambra is a part of metropolitan Los Angeles, located immediately north of East Los

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Angeles, immediately south of South Pasadena and immediately east of the part of Los Angeles sometimes referred to as El Sereno. Bordering Alhambra on the southeast are Monterey Park and Garvey and to the east is San Gabriel. Fox West Coast operates 4 theatres in Alhambra. These theatres compete with the unaffiliated theatres in El Sereno, East Los Angeles, Monterey Park, Garvey and San Gabriel.

"Bakersfield: Bakersfield is the principal city in the San Joaquin Valley. There are 8 theatres in Bakersfield and one theatre in Oildale, a contiguous suburb. Fox West Coast operates 5 of these 9 theatres.

"Beverly Hills. Beverly Hills is a part of metropolitan Los Angeles, being completely surrounded by the City of Los Angeles. Theatres in Beverly Hills are in competition with the affiliated and non-affiliated theatres in that section of the City of Los Angeles. There are 5 theatres in Beverly Hills, 3 operated by Fox West Coast, one by Warner Bros., and one by Mr. Blumenfeld. Two of these theatres, the Fox Wilshire and Mr. Blumenfeld's Beverly Music Hall, are playing first run in the City of Los Angeles. The others are playing Los Angeles neighborhood runs.

"Huntington Park and Inglewood. These towns are part of metropolitan Los Angeles. Huntington Park is located just east of south Los Angeles and Inglewood just west of south Los Angeles. This entire south Los Angeles area is built up residentially so that it is impossible to tell from its appearance where the political boundaries are.

"Fox West Coast operates one of the 4 theatres in Huntington Park and also operates the Lyric theatre in what is called Walnut Park, which is outside the Huntington Park city limits. Warner Bros. operate

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a theatre in Huntington Park and two theatres are operated by unaffiliated exhibitors. These Huntington Park theatres compete with the theatres in south Los Angeles, almost none of which are affiliated with distributors. They also compete with affiliated and non-affiliated theatres in nearby municipalities forming a part of the same residential area, such as Bell, Southgate, Lynwood and the section of Los Angeles County immediately south and east of the city limits.

"Fox West Coast operates 5 of the 6 theatres in Inglewood, the other one being operated by an unaffiliated exhibitor. These Inglewood theatres com-

(2902)

pete with the theatres in south Los Angeles and with the unaffiliated theatres in Hawthorne and Lennox to the south.

"*Riverside and San Bernardino.* These cities are located about ten miles apart, about forty miles east of Los Angeles. The theatres in these cities compete with each other and with the non-affiliated theatres in neighboring cities like Colton, which is located directly between them, and Fontana, which is west of San Bernardino and northwest of Riverside. The Riverside theatres also compete with the non-affiliated theatres in Arlington to the south. In San Bernardino, there are 8 theatres, 5 of which are operated by Fox West Coast, one of which is operated by Warner Bros. and two of which are operated by exhibitors not affiliated with any motion picture distributor. In Riverside there are 4 theatres, or 5 theatres if the small theatre located on the stage of the Fox Riverside is counted as a separate theatre. One of these 4 theatres is operated by an unaffiliated exhibitor and the others by Fox West Coast.

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"Santa Barbara. There are 5 theatres in Santa Barbara, one of which is operated by Fox West Coast and 4 of which are operated by Warner Bros.
(2903)

"D.

"Cities of Less than 25,000 Population

"I am informed that in Exhibit 371 the Government lists certain cities in California with populations of less than 25,000 where Fox West Coast is said to operate the only theatre or theatres in the town. Under ordinary circumstances, a theatre with a seating capacity of about 1,000 can alone adequately provide the facilities desirable for a community of 10,000 or less located outside a metropolitan area. Hence, in a small community, an established exhibitor giving good motion picture service will generally have the only theatre or theatres in such a town. Furthermore, this established exhibitor is usually the first to know whether his theatre has become inadequate to service the community because of the lack of sufficient seats, an increase in population, or otherwise. He is generally the first to provide more seats or better facilities for his community and, as a consequence, it will generally be found that, regardless of the fact of affiliation, the one or two theatres in a small city are owned by the same exhibitor.

"Fox West Coast is charged with having the only
(2904)

theatres in ten cities in California located outside the Los Angeles metropolitan area. Five of these cities are in Southern California and five in Northern California. There are 286 towns in California, excluding Los Angeles County, which have populations of less than 25,000 and also have motion picture theatres.

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There are only one or two theatres in most of these towns and there are competing exhibitors in only twenty-five of them. Thus, Fox West Coast is charged with having theatres in only 10 of the 255 towns in California where there is only one motion picture exhibitor, namely, Banning, Fullerton, Pomona, Porterville, Redlands, Redwood City, San Carlos, San Luis Obispo, Tracy and Watsonville. A similar charge is made in Exhibit 371 with respect to 14 localities in the Los Angeles metropolitan area. Some of these localities are merely local names for parts of the City of Los Angeles and some of them are politically separate municipalities within the City of Greater Los Angeles. Theatres in all these communities compete with nearby theatres in other parts of metropolitan Los Angeles.

"Fox West Coast operates two theatres in the part of the City of Los Angeles called *Wilmington*. These theatres compete with the affiliated and non-affiliated

(2905)

theatres in neighboring sections of Los Angeles and in Long Beach, which is contiguous to this part of Los Angeles. The theatres in *Bell*, *Bell Gardens*, *Compton* and *Maywood* are all in the Huntington Park area. They compete with the independent theatres in Southgate and Lynwood, which are located between Compton and Bell, forming a part of a continuous residential area. They also compete with the non-affiliated theatres located in Downey to the west and Watts to the east and the affiliated and non-affiliated theatres in Huntington Park. The theatres in *Hermosa Beach*, *Manhattan Beach* and *Redondo Beach* compete with the unaffiliated theatres in El Segundo, Hawthorne Gardens, Torrence and Lomita. *North Hollywood* and *Van Nuys*, which is contiguous,

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are each part of the City of Los Angeles. The Fox West Coast theatres there compete with the unaffiliated theatres in Burbank and the affiliated and non-affiliated theatres in Hollywood. *Ocean Park* is a name given to the amusement section comprising the southern part of Santa Monica and the northern part of the section of the City of Los Angeles sometimes called Venice. The theatres in what is called Ocean Park compete with the affiliated theatres in *Venice* and *West Los Angeles* and with the affiliated and non-affiliated theatres in Santa Monica and Culver City, all of which are a part of a single competitive area,

(2906)

and are also competing with other theatres in the western part of the City of Los Angeles. The two Fox West Coast theatres in *South Pasadena* compete with the affiliated theatres in Alhambra to the south and with the affiliated and non-affiliated theatres in Pasadena to the north and on the west with the theatres both affiliated and non-affiliated in that part of Los Angeles known as Highland Park. They also compete with the non-affiliated theatres in the part of Los Angeles to the southwest known as El Sereno.

"Statistical Data

"In 1930, that is, before I became associated with either Fox West Coast Theatres Corporation or National Theatres Corporation, Fox West Coast operated theatres in 62 cities in California. Today it operates theatres in 62 cities in that State. In the meantime, it has lost its theatres in 8 cities (Napa, Turlock, Azusa, Hawthorne, Norwalk, Downey, Burbank and Whittier) and acquired theatres in 8 different cities (Clermont, Compton, Sherman, Manhattan Beach,

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Maywood, Monrovia, Pacific Beach and San Carlos). In 4 of these there previously were no theatres, and new theatres were built by Fox West Coast. In the remaining 4 Fox West Coast acquired existing theatres.

(2907)

"In 1930 the company operated 51 theatres out of 181 theatres in the City of Los Angeles; today it operates 58 theatres out of 222 theatres in that City. The estimated increase in the population of Los Angeles today over that of 1930 is 500,000, or about 40%. There has been an increase of 41 theatres to service this additional population, of which 30 have been constructed and are operated by unaffiliated exhibitors.

"From the above, it can be seen that the small increase in the number of Fox West Coast theatres has no more than kept pace with the expansion of the population or the general development of theatres.

"In 1930 Fox West Coast operated the 'first subsequent run' theatres in 17 neighborhood areas of Los Angeles. Today it has the corresponding run in only 13 of these neighborhoods. In 1930 there were approximately 550 theatres in California to service a population of 5,677,251 and, in 1945, approximately 1,050 theatres to service an estimated population of 7,750,000. Thus, there has been an increase of about 500 theatres in 15 years to service this population increase of 2,000,000. In 1930 Fox West Coast operated 194 theatres throughout California; today it operates 257, or 63 more than it did in 1930. It thus appears

(2908)

that, while the number of theatres has almost doubled in the fifteen-year period, more than 400 of the 500 additional theatres are operated by other exhibitors.

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"In the areas where Fox West Coast Theatres Corporation operates, there are other competing theatre circuits, and such circuits have been expanding rapidly. For example, the Blumenfeld circuit has grown from 7 theatres in 1932 to 35 theatres today. This circuit operates chiefly in Northern California and its principal theatres are generally in competition with Fox West Coast. In about 1932, Blumenfeld operated only one or two theatres in competition with Fox West Coast. Now he operates a number of first run theatres in competition with Fox West Coast in Los Angeles, San Francisco, Oakland, Berkeley, Sacramento and Stockton.

"Southern California Amusement Co., Inc. is an example of a similar rapidly growing non-affiliated circuit in the Los Angeles metropolitan area. Although the owners of this circuit (Harry Vinnicof, J. Y. Berman and James Edwards, Jr.) operated some theatres in 1930, the circuit was not in existence then. This circuit now operates about 38 theatres in the Los Angeles metropolitan area.

"Fox West Coast has not conspired or combined
(2909-2920)

with, and has no agreement or understanding with, any other defendant in this case to restrain interstate trade or commerce or to monopolize or attempt to monopolize interstate trade or commerce in the distribution or exhibition of motion pictures. It has no agreement, express or implied, with any other defendant relating in any way to the distribution or exhibition of motion pictures other than the express license agreements which it has made for the licensing of pictures in its theatres and other than the agreements with Loew's and Paramount referred to on pages 17-19 hereof.

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"I also deny that Fox West Coast, either individually or in conjunction or combination with any other person, has engaged in any practice which is unfair or discriminatory with respect to any exhibitor with which it competes.

(Sgd) Charles P. Skouras."

Koerner Exhibit 1

**LOANS TO RKO RADIO PICTURES, INC., FROM
OTHER PRODUCING COMPANIES OF PLAYERS
AND OTHER PRODUCTION PERSONNEL DUR-
ING THE YEARS FROM 1940 TO 1945.**

Name	Capacity	Producer Who Loaned	Picture
Howard, Mary	Actress	Loew's, Inc.	"Nurse Edith Cavell"
Howard, Mary	Actress	Loew's, Inc.	"Abe Lincoln in Illinois"
Hitchcock, Alfred	Director	Selznick	"Mr. and Mrs. Smith"
Hitchcock, Alfred	Director	Selznick	"Suspicion"
Vidor, Charles	Director	Columbia	"Tuttles of Tahiti"
Bari, Lynn	Actress	Twentieth Century-Fox	"The Gay Falcon"
Baxter, Anne	Actress	Twentieth Century-Fox	"Magnificent Ambersons"
Coles, Mildred	Actress	Warner Bros.	"Debutante Inc."
Coles, Mildred	Actress	Warner Bros.	"Hurry, Charlie, Hurry"
Coles, Mildred	Actress	Warner Bros.	"Lady Scarface"
Drew, Ellen	Actress	Paramount	"My Favorite Spy"
Fontaine, Joan	Actress	Selznick	"Suspicion"
Gilmore, Virginia	Actress	Samuel Goldwyn, Inc.	"Laddie"
Kelly, Nancy	Actress	Twentieth Century-Fox	"Parachute Battalion"
Parrish, Helen	Actress	Universal	"You'll Find Out"
Rogers, Jean	Actress	Twentieth Century-Fox	"Malvina Swings It"
Wyman, Jane	Actress	Warners	"My Favorite Spy"
Cregar, Laird	Actor	Twentieth Century-Fox	"Joan of Paris"
Hall, Jon	Actor	Samuel Goldwyn, Inc., Ltd.	"Tuttles of Tahiti"
Marshall, Alan	Actor	David O. Selznick Prods., Inc.	"Tom, Dick and Harry"
Mature, Victor	Actor	Hal Roach Studios, Inc.	"No, No, Nanette"
Montgomery, Robert	Actor	Loew's, Inc.	"Mr. and Mrs. Smith"
Morgan, Dennis	Actor	Warner Bros.	"Kitty Foyle"
Murphy, George	Actor	Loew's, Inc.	"Three Girls and a Gob"
Murphy, George	Actor	Loew's, Inc.	"Tom, Dick and Harry"
Murphy, George	Actor	Loew's, Inc.	"Mayor of Forty-Fourth Street"
O'Keefe, Dennis	Actor	Loew's, Inc.	"Thousand Dollar Marriage"
O'Keefe, Dennis	Actor	Loew's, Inc.	"You'll Find Out"
Preston, Robert	Actor	Paramount	"Parachute Battalion"
Tyler, Tom	Actor	Republic	"Valley of the Sun"
Whitney, Peter	Actor	Warners	"Valley of the Sun"
Meltzner, S. Lewis	Writer	Columbia	"Tuttles of Tahiti"
Elliot, Paul	Writer	Loew's, Inc.	"It's All True"
Waxman, Franz	Music Director	Loew's, Inc.	"Suspicion"
DeHavilland, Olivia	Actress	Selznick	"Government Girl"
Day, Laraine	Actress	Loew's, Inc.	"From Here To Victory"
Drew, Ellen	Actress	Paramount	"My Favorite Spy"
Hussey, Ruth	Actress	Loew's, Inc.	"Tender Comrade"

Name	Capacity	Producer Who Loaned	Picture
Hussey, Ruth	Actress	Loew's, Inc.	"Marine Raiders"
Randolph, Jane	Actress	Twentieth Century-Fox	"Curse of the Cat People"
Auer, Mischa	Actor	Twentieth Century-Fox	"Around The World"
Dekker, Albert	Actor	Paramount	"Once Upon a Honeymoon"
Fonda, Henry	Actor	Twentieth Century-Fox	"The Big Street"
Hall, Jon	Actor	Samuel Goldwyn, Inc.	"Tuttles of Tahiti"
MacMurray, Fred	Actor	Paramount	"Stand By To Die"
Murphy, George	Actor	Loew's, Inc.	"Navy Comes Through"
Neal, Tom	Actor	Columbia Picts. Corp.	"Behind The Rising Sun"
Wayne, John	Actor	Republic	"Free For All"
Allen, Louis	Director	Paramount	"Those Endearing Young Charms"
Berke, William	Director	William H. Pine Corporation	"Falcon In Mexico"
Cromwell, John	Director	Vanguard	"Enchanted Cottage"
DeHaven, Gloria	Actress	Loew's, Inc.	"Step Lively"
Hasso, Signe	Actress	Loew's, Inc.	"Johnny Angel"
Hayward, Susan	Actress	Paramount	"Deadline At Dawn"
LaMarr, Hedy	Actress	Loew's, Inc.	"Experiment Perilous"
Landis, Carol	Actress	Twentieth Century-Fox	"Having A Wonderful Crime"
Maguire, Dorothy	Actress	Vanguard	"Enchanted Cottage"
Raines, Ella	Actress	Universal	"Tall In The Saddle"
Young, Audrey	Actress	Paramount	"George White Scandals"
Quinn, Anthony	Actor	Twentieth Century-Fox	"China Sky"
Young, Robert	Actor	Loew's, Inc.	"Back to Bataan"
Joslyn, Allyn	Actor	Twentieth Century-Fox	"Enchanted Cottage"
Louis, Lawrence	Actor	Monogram	"Those Endearing Young Charms"
Ephron, Henry and Phoebe	Writers	Twentieth Century-Fox	"Bride By Mistake"
Jarrico, Paul	Writer	Loew's, Inc.	"China Sky"
Partos, Frank	Writer	Paramount	"Back to Bataan"
Pierson, Louise Randall	Writer	Warner	"Bride By Mistake"
Solt, Andrew	Writer	Columbia	"I'm Thinking Of My Darling"
Berry, John	Director	Paramount	"East Wind"
Fontaine, Joan	Actress	Selznick	"The Gibson Girl"
Partos, Frank	Writer	Paramount	"Lena Storm"
Solt, Andrew	Writer	F. R. Productions	"From This Day Forward"
Stevens, Mark	Actor	Twentieth Century-Fox	"From This Day Forward"

Name	Capacity	Producer Who Loaned	Picture
Morgan, Frank	Actor	Loew's, Inc.	"Lady Luck"
nox, Alexander	Actor	Columbia	"Sister Kenny"
leason, James	Actor	Twentieth Century-Fox	"Lady Luck"
leming, Rhonda	Actress	Vanguard	"Some Must Watch"
Driscoll, Bobby	Actor	Disney	"From This Day Forward"
Young, Robert	Actor	Loew's, Inc.	"Lady Luck"
Barrymore, Ethel	Actress	Vanguard	"Spiral Staircase"
McGuire, Dorothy	Actress	Vanguard	"Spiral Staircase"
McGuire, Dorothy	Actress	Vanguard	"They Dream Of Home"
Bergman, Ingrid	Actress	Vanguard	"Notorious"
Madison, Guy	Actor	Vanguard	"They Dream of Home"
iodmak, Robert	Director	Vanguard	"Spiral Staircase"
Hitchcock, Alfred	Director	Vanguard	"Notorious"
chary, Dore	Producer	Vanguard	"Some Must Watch"
Marshall, Alan	Actor	Vanguard	"They Dream Of Home"
DeCamp, Rosemary	Actress	Warner's	"All Kneeling"
Morgan, Henry	Actor	Twentieth Century-Fox	"From This Day Forward"
ontaine, Joan	Actress	Vanguard	"From This Day Forward"
			"All Kneeling"

2132y

Koerner Exhibit 2

**LOANS BY RKO RADIO PICTURES, INC., TO OTHER
PRODUCING COMPANIES OF PLAYERS AND
OTHER PRODUCTION PERSONNEL DURING
THE YEARS FROM 1940-45.**

Name	Capacity	Producer to Whom Loaned	Salary Paid by RKO	Picture	Terms of Loan
David Butler	Director	Paramount	\$4,166.66 per wk.	CAUGHT IN THE DRAFT	\$4,166.74 per wk., 12 wk. guarantee
Phyllis Brooks	Actress	Arnold Prod. Inc.	\$750 per wk.	THE SHANGHAI GESTURE	\$750 per wk., 6 wk. guarantee
Anne Shirley	Actress	Paramount	\$600 per wk.	LITTLE MISS MUFFET	\$1,666.66 per wk., 8 wk. guarantee
Sir Cedric Hardwicke	Actor	Charitable Prod. Inc.	\$1,500 per wk.	LET THE RAPTORS RING	\$1,500 per wk.
"	"	Walter Wanger	"	SUNDOWN	\$750 for one day
Ruth Warrick	Actress	Edward Small	\$400 per wk.	THE CORSICAN BROTHERS	4 wk. guarantee at \$400 per wk. plus 3 weeks salary*
James Ellison	Actor	20th Century Fox	\$750 per wk.	CHARLEY'S AUNT	\$937.50 per wk., 8 wk. guarantee
Tim Holt	Actor	Universal	\$480.76 per wk.	BACK STREET	\$1,200 per wk., 2 wk. guarantee
Philip Reed	Actor	Edward Small	\$500 per wk.	HELIOTROPE HARRY	\$1,000 per wk., 2 wk. guarantee
Dick Hogan	Actor	Republic	\$125 per wk.	RANCHO GRANDE	\$250 per wk., 2 wk. guarantee
James Lydon	"	"	\$300 per wk.	BOWERY BOY	4 wk. guarantee at \$300 per wk. plus 3 weeks salary*
Charles Quigley	Actor	Crescent Pictures	\$125 per wk.	SECRET EVIDENCE	\$250 per wk., 2 wk. guarantee
"	Actor	Loew's, Inc.	\$125 per wk.	A WOMAN'S FACE	\$250 per wk., 1 wk. guarantee
James Craig	Actor	Loew's, Inc.	\$300 per wk.	GAMBLER'S CHOICE	\$1,375 per wk., 6 wk. guarantee
Robert Bice	Actor	Loew's, Inc.	\$250 per wk.	DRAGON SEED	4 wk. guarantee at \$250 per wk. plus 3 weeks salary*
George Cleveland	Actor	Frank Lloyd	\$300-400 per wk.	THE SPOILERS	4 wk. guarantee plus 3 weeks salary*
William Terry	"	Principal Artists	\$200 per wk.	FOR GOD AND COUNTRY	\$41.66 per day

*An additional payment to RKO equal to 3 weeks salary of the person loaned.

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Name	Capacity	Producer to Whom Loaned	Salary Paid by RKO	Picture	Terms of Loan
Robert Stevenson	Director	Selznick	\$1,750 per wk.	JANE EYRE	\$1,500 per week for 6 weeks \$1,750 per week thereafter
Joan Davis	Actress	Universal	\$3,500 per wk.	No Title	\$3,500 per wk., 3 wk. guarantee
Ann Shirley	"	Chas. R. Rogers	\$1,875 per wk.	POWERS GIRL	\$1,875 per wk.
Robert DeGrasse	Cameraman	Universal	\$400 per wk.	PITTSBURGH	\$425 per wk., 10 wk. guarantee
"	"	Hunt Stromberg	\$400 per wk.	G-STRING	\$425 per wk., 10 wk. guarantee
Frank Redman	"	Universal	\$350 per wk.	MURDER MYSTERY	
DeWitt Bodeen	Writer	Selznick	\$175 per wk.	PATRICK THE GREAT	\$400 per wk., no guarantee
Irving Phillips	"	Chas. R. Rogers	\$300 per wk.	LIFE OF AN ACTRESS	\$250 per wk., 2 wk. guarantee
Frank Ryan	"	Samuel Goldwyn	\$350-450 per wk.	SONG OF THE OPEN ROAD	\$400 per wk., 5 wk. guarantee
"	"	Chas. R. Rogers	\$450 per wk.	TREASURE CHEST	\$350-450 per wk., no guarantee
John Twist	Writer	Universal	\$750 per wk.	POWERS GIRL	\$450 per wk., no guarantee
E. E. Verdier	"	Chas. R. Rogers	\$300 per wk.	No Title	\$850 per wk., 3 wk. guarantee
William Cameron Menzies	Producer	Vanguard	\$2,000 per wk.	SONG OF THE OPEN ROAD	\$400 per wk., 5 wk. guarantee
Jacques Tourneur	Director	Universal	600 per wk.	SPELLBOUND and DUEL IN THE SUN	\$6,833.33 for 10 days
June Duprez	Actress	Popular Pictures	\$300 per wk.	CANYON PASSAGE	\$2,666.67 per wk., 15 weeks
"	"	Paramount	\$300 per wk.	THEN THERE WERE NONE	\$900 per wk., 10 wk. guarantee
Tom Conway	Actor	Nero Prod. Inc.	\$550 per wk.	CALCUTTA	\$1,000 per wk., 10 wk. guarantee
Robert Mitchum	"	Lester Cowan Prod. Inc.	\$400-500 per wk.	WHISTLE STOP	\$2,000 per wk., 5 wk. guarantee
				GI JOE	\$800 per wk., 5 wk. guarantee

Name	Capacity	Producer to Whom Loaned	Salary Paid by RKO	Picture	Terms of Loan
Frank Sinatra	Actor	Loew's, Inc.	\$8,750 per wk.	ANCHORS AWEIGH	\$8,750 per wk., 12 wks. guarantee
John Wayne	"	Loew's, Inc.	\$6,250 per wk. for 12 wks., 13, 14, 15 wks. free	THEY WERE EXPENDABLE	\$6,250 per wk., 15 wks. guarantee
Robert DeGrasse	Cameraman	Republic	\$475 per wk.	No Title	\$600 per week
Harry Wild	"	Int'l Pictures	\$400 per wk.	No Title	1 day only
Ann Jeffreys	Actress	Monogram	\$250 per wk.	DILLINGER	\$1,000 per wk., 1 wk. guarantee
Emory Parnell	Actor	20th Century Fox	\$250 per wk.	WILSON	\$500 per wk., 1 wk. guarantee
"	"	Int'l Pictures	\$300 per wk.	CASANOVA BROWN	\$500 per wk., 10 day guarantee
"	"	Columbia	\$300 per wk.	CRIME DOCTOR'S TRAP	\$600 per wk., 3 wk. guarantee
"	"	Manhattan Prod. Inc.	\$300 per wk.	IT'S IN THE BAG	\$327 per day, 2 day guarantee
"	"	Warner Bros.	\$400 per wk.	THE BIG SLEEP	\$1,000 per wk., 1 wk. guarantee
"	"	20th Century Fox	\$400 per wk.	COLONEL EFFINGHAM'S RAID	\$750 per wk., 2 wk. guarantee
"	"	"	\$400 per wk.	STATE FAIR	\$1,000 per wk., 1 wk. guarantee
Lawrence Tierney	Actor	Monogram	\$100 per wk.	DILLINGER	\$500 per wk., 1 wk. guarantee
Aeneas MacKenzie	Writer	Edward Small	\$1,000 per wk.	No Title	\$1,000 per wk., 2 wk. guarantee
Herb Meadow	"	Mar's Film Co.	\$400 per wk.	"	\$400 per wk., 3 wk. guarantee
Paul Eagler	Process Cameraman	New World Prod.		HEART BEAT	1 day only
Lee Harline	Music Director	Universal	\$450 per wk.	CHEERS FOR THE BOYS	\$5,000 Flat

2132bb

Name	Capacity	Producer to Whom Loaned	Salary Paid by RKO	Picture	Terms of Loan
Lee Harline	Music Director	Paramount	\$450 per wk.	ROAD TO UTOPIA	\$750 per week, 3 wk. guarantee
Roy Webb	"	Republic	\$500 per wk.	FIGHTING SEABEES	\$1,000 per week, 1 wk. guarantee
"	"	Paramount	\$500 per wk.	RAINBOW ISLAND	\$750 per week, 5 wk. guarantee
"	"	Loew's, Inc.	\$500 per wk.	SEVENTH CROSS	\$750 per week, 6 wk. guarantee
"	"	Paramount	\$500 per wk.	WELL GROOMED BRIDE	\$750 per week, 3 wk. guarantee
"	"	Republic	"	LOVE, HONOR & GOODBYE	\$750 per week, 4 wk. guarantee
Frank Gruber	Writer	Republic	\$650 per wk.	No Title	\$750 per week, 4 wk. guarantee
Frank Tarloff	"	Int'l Pictures	\$300 per wk.	COUNTESS OF MONTE CRISTO	\$300 per week, 4 wk. guarantee
Ernst-Matray	Dance Director	Chas. R. Rogers	\$750 per wk.	REACHING FOR THE STARS	\$1,000 per week for 10 weeks
Maureen O'Hara	Actress	Paramount	\$2,210 per wk.	TOMORROW'S HARVEST	\$2,812.50 per week, 3 wks.
Dooley Wilson	Actor	Vanguard	\$600 per wk.	SINCE YOU WENT AWAY	\$1,200 per week, 1 wk. guarantee
Theodore Tetzlaff	Cameraman	Columbia	\$1,000 per wk.	No Name	\$1,000 per week
Robert Bice	Actor	Loew's, Inc.	\$250 per wk.	30 SECONDS OVER TOKYO	\$250 per week, no guarantee
Gwen Crawford	Actress	Paramount	\$100 per wk.	HERE COMES THE WAVES	4 wk. guarantee at \$100 per wk. plus 3 weeks salary*
"	"	Chas. R. Rogers	\$100 per wk.	BELLS OF ST. MARY'S	4 wk. guarantee at \$100 per wk. plus 3 weeks salary*

2132c

*An additional payment to RKO equal to 3 weeks salary of the person loaned.

2132dd ©

Koerner Exhibit 3

**TALENT SHARING ARRANGEMENTS
MADE
ETWEEN RKO RADIO PICTURES, INC., AND
OTHER PRODUCING COMPANIES DURING
THE YEARS FROM 1940-1945.**

2132ee

Name	Capacity	Producer Sharing Services With RKO	Producer Having Original Contract
Andersen, Robert	Actor	Vanguard Films, Inc.	RKO Radio Pictures, Inc.
Avery, Bettye	Actress	Samuel Goldwyn, Inc.	Samuel Goldwyn, Inc.
Brind, Tessa	Actress	Vanguard Films, Inc.	Vanguard Films, Inc.
Cole, Janet	Actress	Vanguard Films, Inc.	Vanguard Films, Inc.
Day, Laraine	Actress	Loew's, Inc.	Loew's, Inc.
de Cordova, Arturo	Actor	Paramount	RKO Radio Pictures, Inc.
Henreid, Paul	Actor	Warner Bros.	Warner Bros.
Lee, Anna	Actress	United Producers Corp.	RKO Radio Pictures, Inc.
Mature, Victor	Actor	Twentieth Century-Fox	Twentieth Century-Fox
Moore, Gary	Actor	Vanguard Films, Inc.	Vanguard Films, Inc.
Murphy, George	Actor	Loew's, Inc.	Loew's, Inc.
O'Hara, Maureen	Actress	Twentieth Century-Fox	RKO Radio Pictures, Inc.
Oliver, Gordon	Actor	Vanguard Films, Inc.	Vanguard Films, Inc.
Peck, Gregory	Actor	Casey Robinson	RKO Radio Pictures, Inc.
Peck, Gregory	Actor	Vanguard Films, Inc.	RKO Radio Pictures, Inc.
Stevens, Mark	Actor	Twentieth Century-Fox	Twentieth Century-Fox
Terry, William	Actor	Principal Artists Productions	RKO Radio Pictures, Inc.
Thurston, Carol	Actress	Cecil B. De Mille Productions, Inc.	Cecil B. De Mille Productions,
Toumanova, Tamara	Actress	Casey Robinson	Casey Robinson
Turnell, Dee	Actress	Twentieth Century-Fox	RKO Radio Pictures, Inc.
Vila, Alberto	Actor	Paramount	RKO Radio Pictures, Inc.

Koerner Exhibit 4

**SCHEDULE OF LEASES BY RKO RADIO PICTURES,
INC. TO OTHER PRODUCING COMPANIES OF
STAGE SPACE AND SETS IN MAIN STUDIO
AND RANCH DURING THE PERIOD JAN-
UARY 1, 1939 TO SEPTEMBER 23, 1943.**

2132gg

Name of User	Description of Stage Space and Sets Used	Rental Price
Principal Productions	Stage Space	\$ 180.00
" "	" "	101.25
" "	Stage 2	242.35
" "	" "	127.50
" "	Dubbing Stage	37.50
" "	Stage Space	625.00
" "	" "	625.00
" "	" "	650.00
" "	" "	626.25
" "	" "	652.70
" "	" "	633.75
" "	" "	646.25
" "	" "	632.50
" "	" "	632.50
" "	" "	630.00
" "	" "	658.10
" "	" "	627.25
" "	" "	628.00
" "	" "	630.25
" "	Location Fee	300.00
" "	Stage Space	625.00
" "	Stage 2	100.00
" "	Stage Space	640.75
" "	" "	637.00
" "	" "	625.00
" "	" "	638.50
" "	Recording Stage	100.00
" "	Dubbing Stage	100.00
" "	Stage 2	100.00
" "	Stage Space	630.25
" "	" "	625.75
" "	" "	300.00
" "	" "	625.75
" "	" "	629.50
" "	" "	628.00
" "	" "	660.95
" "	" "	627.50
" "	" "	628.00

2132hh

Name of User	Description of Stage Space and Sets Used	Rental Price
Principal Productions	Stage Space	\$ 628.00
" "	Location Fee	303.50
" "	Stage Space	636.25
" "	" "	653.75
" "	" "	627.25
" "	" "	625.75
" "	" "	626.50
" "	" "	628.00
" "	" "	626.50
" "	" "	626.50
" "	" "	643.75
" "	Stage 2	195.00
" "	Re-Recording Room	75.00
" "	" " "	84.38
" "	Dubbing Room	37.50
" "	Stage 2	112.50
Walter Wanger Productions	Western Street	1,550.00
Columbia Pictures	Square of Midwestern	
" "	Street at RKO Ranch	750.00
" "	French Street	1,250.00
" "	French Street	4,500.00
" "	Location Site—RKO Residential Street—RKO Ranch	750.00
Banner Pictures	"N. Y. Tenement Street"	1,000.00
Republic Productions	French Street	1,250.00
Reed Roland Productions	"Residential Street Set"	1,000.00
Paramount Pictures	Rental of "Hunchback Street"	24,450.00

Dan Michalove

(2921)

Mr. Caskey: I now ask to have the stipulation of Dan Michalove, vice-president of National Theatres Corporation, incorporated into the record. Mr. Michalove's affidavit deals with the operation of a theatre in Detroit and in Philadelphia.

(The affidavit of DAN MICHALOVE is as follows:)

"IT IS HEREBY STIPULATED by and between counsel for the plaintiff herein and counsel for the defendants, Twentieth Century-Fox Film Corporation and National Theatres Corporation, that if called as a witness in this proceeding DAN MICHALOVE would testify as follows:

"I reside at 300 Central Park West, New York City. I am a vice-president and a director of National Theatres Corporation, one of the defendants herein. I have been employed by that company, or one of its subsidiaries, in an executive capacity since 1938. I have been engaged in the motion picture exhibition business for over 25 years.

"National Theatres Corporation, in addition to the theatres operated by its five principal subsidiaries, is now interested, through two wholly owned subsidiaries, in the operation of two outstanding first run 'show case' theatres: The Fox Theatre in Detroit and the Fox Theatre in Philadelphia. These theatres were initially designed to operate with symphony orchestras and stage shows. Both of these theatres were

(2922)

originally constructed by affiliates of Twentieth Century-Fox Film Corporation not only to provide an adequate first-run outlet for its product, but also to

Dan Michalove

further the exploitation of its pictures. These theatres are important releasing points for the product of Twentieth Century-Fox Film Corporation not only in the city in which they are located but in all communities in the surrounding territory. In consequence, Twentieth Century-Fox contributes in large measure to the preparation and the expense of advertising and other exploitation material deemed desirable in the proper launching of its product in these two large theatres.

"Fox Theatre—Detroit

"The Fox Theatre in Detroit, Michigan, with 5,041 seats is the largest and finest theatre in the City of Detroit. It is operated on a first-run policy showing first run in the City of Detroit substantially all of the better pictures distributed by Twentieth Century-Fox, Universal and Columbia. The Fox will occasionally also exhibit a first-run picture distributed by such other distributors as RKO and Monogram. In Detroit, National Theatres Corporation, through a subsidiary, also has a minority interest in the operations of the Adams Theatre (1,545 seats) which operates on

(2923)

a first run or continued first run policy showing pictures distributed by the same companies as those whose pictures are exhibited at the Fox.

"For a period of about seven years between 1931 and 1939 the Fox Theatre was operated by the Union Guardian Trust Company as Receiver. During this period it exhibited first run in the City of Detroit, the pictures of substantially the same distributors as those now being shown in the theatre. The Fox Theatre operates, and has always operated, in competition with the other first run Detroit theatres, and with the sub-

Dan Michalove

sequent run theatres in its area, its principal competitors being United Artists and Michigan Theatres.

"Fox Theatre—Philadelphia, Pa.

"The Fox Theatre in Philadelphia, Pa. is one of the largest and finest theatres in Philadelphia. It has 2,423 seats and is about the same size as the other principal first run theatres with the exception of the 4,700 seat Mastbaum. In the middle 1930's the Fox Theatre was leased to Stanley Company of America, which operated the theatre as a first run Philadelphia house until October 5, 1945, when its existing lease was terminated and the operations of the theatre were again taken over by a subsidiary of National Theatres Corporation. The Fox Theatre is now playing, first

(1924)

run in the City of Philadelphia the pictures distributed by Twentieth Century-Fox Film Corporation. The Fox theatre operates in competition with other first run Philadelphia theatres and with the subsequent run theatres located in the same area.

"Neither National Theatres Corporation, nor its subsidiaries operating theatres in Detroit and Philadelphia, respectively, have conspired or combined with, and none of them has any agreement or understanding with, any other defendant in this case to restrain interstate trade or commerce or to monopolize or attempt to monopolize interstate trade or commerce in the distribution or exhibition of motion pictures. None of them has any agreement, express or implied, with any other defendant, relating in any way to the distribution or exhibition of motion pictures other than the express license agreements each of such subsidiaries has made for the licensing of pictures in its theatre or theatres.

Harry G. Ballance

"I also deny that National Theatres Corporation, or its subsidiaries operating theatres in Philadelphia and Detroit, respectively, either individually or in conjunction or combination with any other person have engaged in any practice which is unfair or discriminatory with respect to any exhibitor with which they or any of them compete.

(Sgd.) Dan Michalove."

(2925)

Mr. Caskey: In the course of the testimony the defendant Twentieth Century-Fox called its general sales manager, Mr. Kupper, and there were also present in court the vice-president in charge of production, Mr. Connors, and the eastern sales manager, Mr. Smith, and their stipulations were received orally. I have now stipulations from the other three division sales managers, Mr. Harry G. Ballance, who has the South; Mr. William C. Gehring, sales manager for the Central Division, and Mr. Herman Wobber, who has the West.

I ask to have these incorporated into the record.

(The affidavit of HARRY G. BALLANCE is as follows:)

"HARRY G. BALLANCE, being duly sworn, deposes and says:

"I have been employed by Twentieth Century-Fox Film Corporation or its predecessor since November 28, 1932 when I became southern district manager. On August 3, 1942, I became division manager for the southern division and on August 27, 1945, the southern division was made an entirely autonomous division.

"As such sales manager, I have direct charge of The Twentieth Century-Fox Film exchanges in Atlanta, Georgia, Charlotte, North Carolina, New

Harry G. Ballance

Orleans, Louisiana, Dallas, Texas, Memphis, Tennessee, and Oklahoma City, Oklahoma.

(2926)

"In the respective exchange areas over which I have supervision, there is not now, and to the best of my knowledge, information and belief there has not been any contract, agreement, understanding or concert of action between Twentieth Century-Fox and any one or more of the defendants with respect to any of the following matters:

"The restraining of competition among or between the defendants, or any of them, in either the distribution or the exhibition of motion pictures.

"The terms upon which or the time when feature films were or were to be licensed by any distributor defendant to any exhibitor.

"The discriminating in favor of so-called 'affiliated' against so-called 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called 'affiliation.'

"The exclusion of so-called 'independent' exhibitors from operating first run theatres in competition with so-called 'affiliated' theatres.

"The exclusion of so-called 'independent' exhibitors from operating subsequent run theatres on the same run as and in competition with so-

(2927)

called 'affiliated' theatres.

"The use of first and other early run so-called 'affiliated' theatres to control the film supply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres.

"The division of available films among theatres owned or controlled by two or more producer-exhibitor defendants.

Harry G. Ballance

"The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers.

"The form of license agreement used or to be used after 1930, in licensing the exhibition of films or any provision included or to be included therein.

"The film rental, whether flat or percentage, charged or to be charged by Twentieth Century-Fox to any theatre or theatres.

"The run granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre.

"The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner or form in which the clearance in any city or area shall be set up or stated.

(2928)

"The minimum admission prices inserted or to be inserted in licenses for any theatre, whether a so-called 'affiliated' theatre or not.

"In saying this I do not, of course, refer to individual contracts licensing the exhibition of films which Twentieth Century-Fox, as a distributor or exhibitor has regularly made in the course of its business with another of the defendants herein, the legal effect of which is limited to the contracting parties. I do deny any combination of the defendants to do the acts which I have mentioned at any time after the ending of the National Recovery Act.

"In each of the exchange areas over which I have supervision, Twentieth Century-Fox has not prevented any defendant or any so-called 'independent' distributor from competing with Twentieth Century-Fox for

William C. Gehring

the distribution of film product. Nor has it ever discriminated in favor of so-called 'affiliated' theatres against 'independent' theatres with respect to any of the license terms granted because of the so-called affiliation. Nor has Twentieth Century-Fox ever conditioned its granting a license for the exhibition of films distributed by Twentieth Century-Fox in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting (2929)

National theatres a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by National.

"Nor has Twentieth Century-Fox any agreement or understanding with any prior run exhibitor, either a so-called 'affiliate' or 'independent', fixing the minimum admission price which Twentieth Century-Fox must insert in its license agreement with a subsequent-run exhibitor."

Jurat.

signed HARRY G. BALLANCE.

(The affidavit of WILLIAM C. GEHRING is as follows:)

"WILLIAM C. GEHRING, being duly sworn, deposes and says:

"I have been employed by Twentieth Century-Fox Film Corporation or its predecessor since December 30, 1918, when I was engaged as a poster clerk in the Buffalo branch office. Since then I have been a salesman and an assistant manager in several exchanges, a branch manager in several exchanges, a home office representative with special sales duties in New York and on December 28, 1936, I was made central sales manager. On July 7, 1942, I became western sales manager and on August 27, 1945, I became sales manager for the central division.

"As such sales manager, I have the direct supervision of the Twentieth Century-Fox Film exchanges

William C. Gehring

in Chicago, Illinois, Detroit, Michigan, Milwaukee, Wisconsin, Cincinnati, Ohio, Cleveland, Ohio, Indian-

(2930)

apolis, Indiana, Des Moines, Iowa, Minneapolis, Minnesota, Omaha, Nebraska, Kansas City, Kansas, St. Louis, Missouri, and of all of the Canadian exchanges.

"In the respective exchange areas over which I have supervision, there is not now, and to the best of my knowledge, information and belief there has not been any contract, agreement, understanding or concert of action between Twentieth Century-Fox and any one or more of the defendants with respect to any of the following matters:

"The restraining of competition among or between the defendants, or any of them, in either the distribution or the exhibition of motion pictures.

"The terms upon which or the time when feature films were or were to be licensed by any distributor defendant to any exhibitor.

"The discriminating in favor of so-called 'affiliated' against so-called 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called 'affiliation'.

"The exclusion of so-called 'independent' exhibitors from operating first run theatres in competition with so-called 'affiliated' theatres.

"The exclusion of so-called 'independent' exhibitors from operating subsequent run theatres on the same run as and in competition with so-

(2931)

called 'affiliated' theatres.

William C. Gehring

"The use of first and other early run so-called 'affiliated' theatres to control the film supply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres.

"The division of available films among theatres owned or controlled by two or more producer-exhibitor defendants.

"The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers.

"The form of license agreement used or to be used after 1930, in licensing the exhibition of films or any provision included or to be included therein.

"The film rental, whether flat or percentage, charged or to be charged by Twentieth Century-Fox to any theatre or theatres.

"The run granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre.

"The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner

(2932)

or form in which the clearances in any city or area shall be set up or stated.

"The minimum admission prices inserted or to be inserted in licenses for any theatre, whether a so-called 'affiliated' theatre or not.

"In saying this I do not, of course, refer to individual contracts licensing the exhibition of films which Twentieth Century-Fox, as a distributor or exhibitor has regularly made in the course of its business with another of the defendants herein, the legal effect of which is limited to the contracting parties. I do deny any combination of the de-

Herman Wobber

defendants to do the acts which I have mentioned at any time after the ending of the National Recovery Act.

"In each of the exchange areas over which I have supervision, Twentieth Century-Fox has not prevented any defendant or any so-called 'independent' distributor from competing with Twentieth Century-Fox for the distribution of film product. Nor has it ever discriminated in favor of so-called 'affiliated' theatres against 'independent' theatres with respect to any of the license terms granted because of the so-called affiliation. Nor has Twentieth Century-Fox ever conditioned its granting a license for the exhibition of films distributed by Twentieth Century-Fox in theatres operated or controlled by another producer-

(2933)

exhibitor defendant upon such other defendant granting National Theatres a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by National.

"Nor has Twentieth Century-Fox any agreement or understanding with any prior run exhibitor, either a so-called 'affiliate' or 'independent', fixing the minimum admission price which Twentieth Century-Fox must insert in its license agreement with a subsequent-run exhibitor."

Jurat.

(signed) WILLIAM C. GEHRING.

(The affidavit of Herman Wobber is as follows:)

"HERMAN WOBBER, being duly sworn, deposes and says:

"At the present time I am one of the four Divisional Sales Managers of Twentieth Century-Fox Film

Herman Wobber

Corporation. I have been employed by Twentieth Century-Fox since November 12, 1932, when I became District Manager of the Pacific Coast Division. On June 6, 1938, I became General Sales Manager at New York City. On June 1, 1942, I left New York to become Western Division Manager and Pacific Coast District Manager. On September 14, 1942, I became Division Manager for the West Coast and on August 27, 1945, the Western Division was made a separate autonomous division.

(2934) "As Western Division Manager I am in charge of the Twentieth Century-Fox Film exchanges in Den-

ver, Colorado, Salt Lake City, Utah, Los Angeles, California, Portland, Oregon, San Francisco, California and Seattle, Washington.

"In the respective exchange areas over which I have supervision, there is not now, and to the best of my knowledge, information and belief there has not been any contract, agreement, understanding or concert of action between Twentieth Century-Fox and any one or more of the defendants with respect to any of the following matters:

"The restraining of competition among or between the defendants, or any of them, in either the distribution or the exhibition of motion pictures.

"The terms upon which or the time when feature films were or were to be licensed by any distributor defendant to any exhibitor.

"The discriminating in favor of so-called 'affiliated' against so-called 'independent' theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of the so-called 'affiliation'.

Herman Wobber

"The exclusion of so-called 'independent' exhibitors from operating first run theatres in competition with so-called 'affiliated' theatres."

"The exclusion of so-called 'independent' exhibitors from operating subsequent run theatres on the same run as and in competition with so-called 'affiliated' theatres."

(2935)

"The use of first and other early run so-called 'affiliated' theatres to control the film supply, run, clearance or admission prices of operators of competing 'unaffiliated' theatres."

"The division of available films among theatres owned or controlled by two or more producer-exhibitor defendants."

"The preventing or hindering of the distribution of motion pictures produced by so-called 'independent' producers."

"The form of license agreement used or to be used after 1930, in licensing the exhibition of films or any provision included or to be included therein."

"The film rental, whether flat or percentage, charged or to be charged by Twentieth Century-Fox to any theatre or theatres."

"The run granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre."

"The clearance granted or to be granted for any theatre, whether a so-called 'affiliated' theatre or a so-called 'independent' theatre, or the manner or form in which the clearances in any city or area shall be set up or stated."

Herman Wobber

(2936)

"The minimum admission prices inserted or to be inserted in license for any theatre, whether a so-called 'affiliated' theatre or not.

"In saying this I do not, of course, refer to individual contracts licensing the exhibition of films which Twentieth Century-Fox, as a distributor or exhibitor has regularly made in the course of its business with another of the defendants herein, the legal effect of which is limited to the contracting parties. I do deny any combination of the defendants to do the acts which I have mentioned at any time after the ending of the National Recovery Act.

"In each of the exchange areas over which I have supervision, Twentieth Century-Fox has not prevented any defendant or any so-called 'independent' distributor from competing with Twentieth Century-Fox for the distribution of film product. Nor has it ever discriminated in favor of so-called 'affiliated' theatres against 'independent' theatres with respect to any of the license terms granted because of the so-called affiliation. Nor has Twentieth Century-Fox ever conditioned its granting a license for the exhibition of films distributed by Twentieth Century-Fox in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting National Theatres a license for the exhibition of

(2937)

films distributed by such other defendant in theatres operated or controlled by National.

"Nor has Twentieth Century-Fox any agreement or understanding with any prior run exhibitor, either a so-called 'affiliate' or 'independent,' fixing the minimum admission price which Twentieth Century-Fox

Colloquy

must insert in its license agreement with a subsequent-run exhibitor."

Mr. Caskey: Will you mark this for identification.

(Marked Defendant Twentieth Century-Fox Exhibit F-23 for identification.)

Mr. Caskey: I offer in evidence F-23 for identification, being a resume of the film rentals paid by National Theatres to several distributors of motion pictures from the year 1935 through 1944 in terms of percentage.

Mr. Wright: I take it on this Exhibit F-23 that the initials GWTW stand for the picture Gone With The Wind. The Court does not know that.

Mr. Caskey: I will so stipulate.

(Defendant Twentieth Century-Fox's Exhibit F-23 for identification received in evidence.)

Mr. Caskey: Will you mark this for identification.

(Marked Defendant Twentieth Century-Fox's

(2938)

Exhibit F-2 for identification.)

Mr. Caskey: I offer in evidence Exhibit F-24 for identification, being a schedule showing the earnings after taxes and dividends paid by National Theatres Corporation.

(Defendant Twentieth Century-Fox's Exhibit F-24 for identification received in evidence.)

Mr. Caskey: Will you mark this for identification.

(Marked Defendant Twentieth Century-Fox's Exhibit F-25 for identification.)

Harold J. Mirisch

Mr. Caskey: I offer in evidence F-25 for identification, an illustrated schedule prepared from Exhibit F-21 showing the relationship of the revenue derived from the first-run in the 92 cities compared with the total revenue in the United States on the picture Sweet Rosie O'Grady, and the distribution of that first-run revenue among nine groups of theatres, including five of the defendants. The phrase "National Theatres" embraces the Roxy Theatre.

(2939)

Mr. Caskey: I offer in evidence Defendant Fox's Exhibit F-26, which is again simply an illustration of the data already in evidence as F-19. It consists of three charts and is, I think, self-explanatory.

(Marked Fox's Exhibit F-26 in evidence.)

Mr. Caskey: Finally, I offer in evidence Defendant Fox's Exhibit F-27, two charts, showing the percentage of revenue derived from the five exhibitor defendants to the total revenue. This is predicated upon Exhibit F-18 already in evidence.

(Marked Fox's Exhibit F-27 in evidence.)

Mr. Caskey: The defendants Twentieth Century-Fox and National Theatres Corporation rest.

Mr. Leisure: If the Court please, we have three stipulations which we have taken up with Mr. Wright, general denials, with respect to Mr. Ned E. Depinet, Mr. Harold J. Mirisch and Mr. J. Malcolm Kingsberg, which we ask to have incorporated in the record.

(The stipulations are as follows):

"IT IS HEREBY STIPULATED, that if HAROLD J. MIRISCH were called as a witness in behalf of the RKO defendants in the above-entitled action, he would tes-

Harold J. Mirisch

tify that he is, and since June 1942 has been generally in charge of the licensing of pictures for exhibition in theatres operated by Radio-Keith-Orpheum Corporation or its subsidiaries, and during said time has (2940)

been generally familiar with the policies pursued by the RKO defendants in the licensing of pictures for exhibition in said theatres.

"APPENDIX A

"IT IS FURTHER STIPULATED, that if said witness were called upon to testify in response to the questions annexed hereto as Appendix A, he would answer in the negative.

"1. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area without competitive negotiations?

"2. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants not to compete with one another in the licensing of motion pictures to be exhibited in cities or towns where two or more of them had interests in theatres?

"3. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to enter into joint agreements with respect to a theatre where the film buying control or

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proceeds from the operation thereof is divided be-
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tween two or more exhibitor defendants for the purpose of unreasonably restraining competition or monopolizing exhibition or distribution with respect to such theatre?

"4. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to refrain from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres?

"5. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants, to acquire a monopoly or to monopolize the business of exhibiting motion pictures in the United States or in any city, town or competitive area therein?"

"IT IS HEREBY STIPULATED, that if NED E. DEPINET were called as a witness in behalf of the RKO defendants in the above entitled action, he would testify that he is, and since June 25, 1942 has been, president of RKO Radio Pictures, Inc., and that between January 14, 1932 and June 25, 1942 he was vice president of RKO Radio Pictures, Inc., and that during all of such time he has been generally familiar with the policies of RKO Radio Pictures, Inc. in licensing the pictures which it distributes.

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"IT IS FURTHER STIPULATED, that if said witness were called upon to testify in response to the questions annexed hereto as Appendix A, he would answer in the negative.

"APPENDIX A.

"1. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to fix the terms upon which motion pictures would be licensed for exhibition to any exhibitor in the United States?

"2. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to license any pictures for exhibition in any theatre before the pictures have been purchased and before any exhibitor has had a fair opportunity to estimate the value and character of the films licensed and before such films have been completed or trade shown?

"3. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to condition the licensing of one or more films or group of films upon the licensing of another film or group of films?

(2943) "4. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or

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defendants to condition the licensing of film in one theatre or group of theatres upon the licensing of film in another theatre or group of theatres?

"5. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants to enter into long term franchises with circuits or theatres or to suppress competition offered by competing theatres during the terms of such long term franchises or to preclude independent distributors from licensing their pictures to those circuit theatres?

"6. Has there been or is there to your knowledge any understanding or agreement between any RKO defendant or defendants and any other defendant or defendants to discriminate with respect to the license terms granted to circuit theatres because such theatres are part of a circuit?

"7. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant and any other defendant or defendants to favor, in licensing their pictures, the theatres in which the defendants or any of them have an interest as against the theatres of exhibitors in which none of the defendants has an interest either with respect to run, clearance, license fees, or any other license terms?

(2944)

"8. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to license pictures for exhibition in the theatres, or in any theatre, in which one of the defendants has an interest, on condition or in considera-

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tion of such other defendant licensing its pictures for exhibition in a theatre or theatres in which RKO has an interest?

"9. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to exclude independently produced motion pictures from theatres in which the defendants or any of them have an interest?

"10. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to exclude non-affiliated exhibitors from the operation of competing first run theatres in cities and towns where there are theatres in which a defendant or defendants have an interest?

"11. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to exclude unaffiliated exhibitors from operating competing theatres on the same run as the subsequent-run affiliated theatres in the cities and towns where affiliated theatres are located?

(2945)

"12. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to control the film supply, run, clearance and admission price of operators of unaffiliated theatres in the cities, towns or competitive areas where affiliated theatres are located or elsewhere?

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"13. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants as to the terms upon which each or any of them would license its film to unaffiliated exhibitors?

"14. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to deprive any theatre operator of the supply of film or to withhold film from an unaffiliated exhibitor or to limit the terms and conditions on which licenses would be made to any unaffiliated exhibitor?

"15. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located
(2946) in the same competitive area without competitive negotiations?"

"IT IS HEREBY STIPULATED, that if J. MALCOLM KINGSBERG were called as a witness in behalf of the RKO defendants in the above-entitled action, he would testify that he is, and since September 20, 1943 has been, vice president and treasurer of Radio-Keith-Orpheum Corporation (Delaware); that from April 26, 1934 until the corporation was dissolved on September 29, 1944, he was vice-president of Keith-Albee-Orpheum Corporation; that he is, and since January

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18, 1940 has been, vice president of B. F. Keith Corporation; that he is, and since December 1941 has been, president of RKO Orpheum Corporation; that he is, and since February 17, 1942 has been, president of RKO Midwest Corporation; that he is, and since May 26, 1942 has been, president of RKO Proctor Corporation; and that during the time he occupied the positions above stated he was familiar with the policies of the RKO defendants in respect of the licensing of pictures in theatres operated by Radio-Keith-Orpheum Corporation or its subsidiaries.

"IT IS FURTHER STIPULATED, that if said witness were called upon to testify in response to the questions annexed hereto as Appendix A, he would answer in the negative.

(2947)

"APPENDIX A.

"1. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to divide the available films among the affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area without competitive negotiations?

"2. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants not to compete with one another in the licensing of motion pictures to be exhibited in cities or towns where two or more of them had interests in theatres?

"3. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or

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defendants to enter into joint agreements with respect to a theater where the film buying control or proceeds from the operation thereof is divided between two or more exhibitor defendants for the purpose of unreasonably restraining competition or monopolizing exhibition or distribution with respect to such theatre?

(2948) "4. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or

defendants to refrain from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres?

"5. Has there been or is there to your knowledge any agreement or understanding between any RKO defendant or defendants and any other defendant or defendants to acquire a monopoly or to monopolize the business of exhibiting motion pictures in the United States or in any city, town or competitive area therein?"

Judge Bright: Is that your case, Mr. Leisure?

Mr. Leisure: Yes, sir.

Judge Hand: All the defendants then rest, is that right?

Mr. Seymour: I had certain reservations, your Honors will recall, to add a few affidavits and the problem of correcting the record, and those reservations persist, and, subject to them, I have rested.

Judge Hand: Are they on the wing now?

Mr. Seymour: I am told so.